166-226

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~102.~~ 129

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JULY 5, 1894.

(15,622.)

(15,622.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 402.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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a UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said supreme court, between The Chicago, Burlington and Quincy Railroad Company and The City of Chicago, in an action of condemnation, a manifest error hath happened, to the great damage of the said The Chicago, Burlington and Quincy Railroad Company, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the ninth day of June, A. D. 1894, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 17th day of May, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the 118th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

b [Endorsed:] Supreme Court of the United States. Chicago, Burlington and Quincy Railroad Company *vs.* The City of Chicago. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. — northern district of Illinois.

c Supreme Court of Illinois, Northern Grand Division.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Circuit Court, Cook Co.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, do hereby certify that on the nineteenth day of May, in the year A. D. 1894, a copy of the foregoing writ of error for defendants in error was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this third day of July, A. D. 1894.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

ALFRED H. TAYLOR, *Clerk.*

d UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the ninth day of June, in the year 1894, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois for the northern grand division, wherein The Chicago, Burlington & Quincy Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable the chief justice of the supreme court of the State of Illinois this 11th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BAKER,
Chief Justice of the Supreme Court of the State of Illinois.

Service of above citation acknowledged May 19th, 1894.
THE CITY OF CHICAGO,
By JOHN P. HOPKINS, *Mayor.*

e Supreme Court of Illinois, Northern Grand Division.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO.	Appeal from Circuit Court, Cook Co.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, do hereby certify that on the nineteenth day of May, in the year A. D. 1894, a copy of the foregoing citation and return was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this third day of July, A. D. 1894.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

ALFRED H. TAYLOR, *Clerk.*

f Supreme Court of Illinois, Northern Grand Division.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO.	Appeal from Circuit Court of Cook Co.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, by virtue of the foregoing writ of error

and in obedience thereto, do hereby certify that the following pages, numbered from one to 187, inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office. Pages numbered 188 to 193, inclusive, include the errors assigned upon said record.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court of Illinois to be hereunto affixed, at Ottawa, in said State, this third day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

ALFRED H. TAYLOR, *Clerk.*

1 At a supreme court begun and held at Ottawa on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-two, within and for the northern grand division of the State of Illinois.

Present: Joseph M. Bailey, chief justice; John Scholfield, justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; David J. Baker, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the fourth day of October, A. D. 1892, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Cook county in a cause entitled in said supreme court The Chicago, Burlington and Quincy Railroad Company *vs.* The City of Chicago; which said transcript is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } ss:
State of Illinois, Cook County, }

Pleas before the Honorable Frank Baker, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 18th day) of July, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

Present: Honorable Frank Baker, one of the judges of the circuit court of Cook county, State of Illinois; Joel M. Longenecker, State's attorney; James H. Gilbert, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 12th day of November, A. D. 1890, the City of Chicago, by Jonas Hutchinson, F. E. Halligan, its attorneys, filed in said court its certain petition for condemnation, and thereupon there issued out of said court and under

the seal thereof the people's writ of summons, directed to the sheriff of Cook county to execute; which said petition and said summons, together with the return of the sheriff thereon endorsed, are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

To the honorable the circuit court of Cook county, Illinois:

3 Your petitioner, The City of Chicago, respectfully shows that heretofore, to wit, on the 6th day of October, A. D. 1899, the city counsel of said city did pass an ordinance providing that Rockwell street be opened and widened between W. 18th street and W. 19th street; a certified copy of which ordinance is hereto attached and made part hereof. The following is a description of the lots, pieces, and parcels of land and property which will be taken or damaged for the improvement, and the names of the owners or occupants thereof, and of the parties having an interest therein, so far as known to the corporation counsel, the officer filing this petition:

4 *Walker's Douglas Park Addition to Chicago.*

Name of owners, occupants, and parties having an interest in property so far as known to the officer filing this petition.	Improvements.	Part or lot of land.	Sublot.	Lot.	Blk.
W. A. Golden		No. 1, west 33 feet			5
A. H. Walker		No. 2, west 33 feet			8
Mary G. Burnett		East 33 feet East 33 feet. South 138.7 feet of. Ex. south 138.7 feet. May read as follows, to wit:			9
C., B. & Q. R. R. Co	That part of the right of way of the Chicago, Burlington & Quincy Railroad Company and of the 4.72 acres of the S. E. ¼ section 24, 39, 13 [conveyed by Allan Robbins to the C., B. & Q. R. R. Co., called tract "A"]*, lying between the east line produced [re-spectively]* northwardly [& southwardly]* of the west 33 feet of [blocks 5 and]* 8 and [be-tween]* the west line produced northwardly of the east 33 feet of block 9, all of said Walker's Douglas Park addition to Chicago.				

*[Words enclosed in brackets erased in copy.]

5 Your petitioner prays that all and singular the persons named aforesaid, and who are hereby made parties defendant hereto, may be summoned in accordance with the statute in such case made and provided, and that said above-described lots, pieces, and parcels of land and property, or so much thereof as may be necessary, may be condemned for the improvement or purpose specified in said ordinance, and that the just compensation to be made for private property to be taken or damaged for the improvement or purpose specified in said ordinance shall be ascertained by

a jury in the manner provided by law, and that such other and further proceedings may be had herein as to the court may seem meet and the nature of the case may require, etc.

MORRIS ST. THOMAS,
Acting Corporation Counsel.

Report and Ordinance in Condemnation Proceedings.

To the mayor and aldermen of the city of Chicago in city counsel assembled:

6 In accordance with an order of your honorable body, I submit herewith an ordinance for opening and widening Rockwell street from West 18th street to West 19th street.

Respectfully submitted.

W. H. PURDY,
Commissioner of Public Works.

Dated this sixth day of October, A. D. 1890.

An ordinance for the opening and widening of Rockwell street from West 18th street to West 19th street.

Be it ordained by the city counsel of the city of Chicago:

SECTION 1. That Rockwell street be opened and widened from West 18th street to West 19th street by condemning therefor the west 33 feet of blocks 5 and 8 the east 33 feet of block 9 all of Walker's Douglas Park addition to Chicago being a subdivision of E. ½ S. E. ¼ and the E. ½ of the W. ½ of the S. E. ¼ (except railroad lands) of section 24 39 13. Also that part of the right of way of the Chicago, Burlington & Quincy Railroad Company and that part of the 4.72 acres of said S. E. ¼ section 24, 39, 13, conveyed by Allen Robbins to the C. B. & Q. R. R. Co. called tract "A" lying between the east line produced respectively north and southwardly of the west 33 feet of blocks 5 and 8, and between the west line produced northwardly of the east 33 feet of block 9, all of said Walker's Douglas Park addition to Chicago, in accordance with the plan hereto annexed.

SECTION 2. That said improvement shall be made, and the
7 cost thereof paid for by a special assessment to be levied upon the property benefitted thereby to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation; in accordance with article nine (9) of an act of the General Assembly of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," approved the tenth day of April, A. D. 1872, and adopted by the common council of said city by ordinance passed the second day of September A. D. 1872.

SECTION 3. That the counsel to the corporation be and he is hereby directed to file a petition in the circuit court of Cook county, Illinois, in the name of the City of Chicago, praying that "the just compensation to be made for private property to be taken or dam-

aged for said improvement or purpose specified in this ordinance shall be ascertained by a jury," and to file a supplemental petition in accordance with the provisions of section fifty-three (53) of said article nine (9).

SECTION 4. This ordinance shall be in force from and after its passage.

Document No. 3384.

Report and ordinance for opening and widening Rockwell St. from W. 18th street to W. 19th street.

Referred to the committee on —, —— —, 189–.

——— ———, *City Clerk.*

8 Ordinance passed and deposited in the office of city clerk Oct. 6th, 1890.

FRANZ AMBERY, *City Clerk.*

Approved Oct. 9th, 1880.

DEWITT C. CREGIER, *Mayor.*

STATE OF ILLINOIS, } ss:
City of Chicago, }

I, Franz Amberg, city clerk of the city of Chicago, do hereby certify that the annexed and foregoing is a true and correct copy of document No. 3384 of 1890–'91 and of the endorsements thereon, the same being a certain "report and ordinance," on file in my office.

I do further certify that the original, of which the foregoing is a true copy, is entrusted to my care for safe keeping and is on file in my office.

Witness my hand and the corporate seal of said city this 29th day of October, A. D. 1890.

[SEAL.] FRANZ AMBERY, *City Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook Co., November Term, 1890.

9 CITY OF CHICAGO
vs.
W. A. GOLDEN, H. H. WALKER, MARY G. BURNETT, CHICAGO, Burlington and Quincy Railroad Company, and the Unknown Owners of the West 33 Feet of Blocks 5 & 8, the East 33 Feet of Block 9, all of Walker's Douglass Park Addition to Chicago, being a Subdivision of E. ½ S. E. ¼ and the E. ½ of the W. ½ of S. E. ¼ (except Railroad Lands) of Section 24, 39, 13; also that Part of the Right of Way of the Chicago, Burlington & Quincy Railroad Company and that Part of the 4.72 Acres of said S. E. ¼, Section 24, 39, 13, Conveyed by Allan Robbins to the C., B. & Q. R. R. Co., Called Tract A, Lying Between the East Line Produced Respectively North and Southwardly of the West 33 Feet of Block- 5 and 8 and Between the West Line Produced Northwardly of the East 33 Feet of Block 9, all of said Walker's Douglass Park Addition to Chicago.

In the matter of the petition of the City of Chicago for the ascertainment of the just compensation to be made for private property to be taken or damaged for opening and widening Rockwell street from West Eighteenth street to West Nineteenth street.

Morris St. P. Thomas, being duly sworn, says he is the acting corporation counsel of the City of Chicago, the officer filing the petition in the above-entitled cause, and that the owners of the lots, pieces, and parcels of the land and property described above are to him unknown.

MORRIS ST. P. THOMAS.

Subscribed and sworn to before me this 12th day of Nov., 1890.

[SEAL.] LARS P. NELSON,
Notary Public.

10 86019.

Term No., —. No. —.

In the matter of petition of the City of Chicago for the ascertainment of the cost of opening and widening Rockwell street from West 18th street to West 19th street.

Filed this 12th day of November, A. D. 1890.

HENRY BEST, *Clerk.*

JONAS HUTCHINSON,
F. E. HALLIGAN, *Attorney-.*

STATE OF ILLINOIS, } ss :
Cook County, }

The People of the State of Illinois to the sheriff of Cook county, Greeting:

We command you that you summon W. A. Golden, H. H. Walker, Mary G. Burnett, Chicago, Burlington and Quincy Railroad Company, and the unknown owners, if they shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the term thereof to be held at the court-house, in Chicago, in said Cook county, on the third Monday of December, 1890, to answer unto the City of Chicago in its certain petition
11 for the ascertainment of the just compensation to be made for private property to be taken or damaged for opening and widening Rockwell street from West 18th street to West 19th street, filed in said court on the common-law side thereof; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of our said circuit court, and
[SEAL.] the seal thereof, at Chicago aforesaid, this 12th day of November, A. D. 1890.

HENRY BEST, *Clerk.*

Served this writ on the within-named defendant, H. H. Walker, by delivering a copy thereof to him the 19th day of November, 1890.

Also served this writ on the within-named defendant, Chicago, Burlington and Quincy Railroad Company, by delivering a copy thereof to J. C. Peasley, vice-president of company, the 19th day of November, A. D. 1890; the president not found in my county; the other within-named defendants not found in my county.

CANUTE R. MATSON, *Sheriff,*
By W. A. JOHNSON, *Deputy.*

And thereupon, on the 15th day of December, A. D. 1890, there was filed in said *county* a certain appearance, which is in the words and figures following, to wit:

12 Copy.

STATE OF ILLINOIS, } ss :
County of Cook, }

In the Circuit Court Thereof.

In the Matter of the Petition of THE CITY OF CHICAGO for the Ascertainment of the Cost of Opening and Widening Rockwell Street from West 18th Street to West 19th Street. No. 86019.

I hereby enter my appearance for the defendant The Chicago, Burlington and Quincy Railroad Company.

CHESTER M. DAWES,
Att'y for C., B. & Q. R. R. Co., Def't.

13 And afterwards, to wit, on the 12th day of February, A. D. 1891, there was filed in said court a certain certificate of publication, which is in the words and figures following, to wit:

This certifies that a notice, of which the annexed printed slip is a true copy, was published for four successive weeks, to wit, four successive times, in the Chicago Mail, a daily newspaper published in the city of Chicago, of general circulation throughout Cook county and the State of Illinois; that the date of the first paper containing same was the 14th day of November, A. D. 1890; that the date of the last paper containing the same was the 5th day of December, A. D. 1890, and that we have received thirteen dollars and sixty cents for publishing the same.

Dated at Chicago the 11th day of February, 1891.

THE CHICAGO TIMES CO.
H. J. HUISHRATSVS, *Publishers.*

Notice is in words and figures following:

Notice of Proceedings for Opening and Widening Rockwell Street from West Eighteenth to West Nineteenth Street.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court of Cook County, November Term, 1890.

CITY OF CHICAGO
v.
W. A. GOLDEN, H. H. WALKER, MARY G. BURNETT, Chicago, Burlington and Quincy Railroad Company, and the Unknown Owners. } No. 86019.

Affidavit that the owners of the following-described lots, pieces, and parcels of land and property to be taken or damaged
14 for opening or widening Rockwell street from West Eighteenth street to West Nineteenth street, to wit, the west 33 feet of block- five and eight, the east 33 feet of block 9, all of Walker's Douglass Park addition to Chicago, being a subdivision of E. ½ S. E. ¼ and the E. ½ of the west ½ of S. E. ¼ (except railroad lands) of sec. 24, 39, 13, also that part of the right of way of the Chicago, Burlington and Quincy Railroad Company and that part of the 4.72 acres of said S. E. ¼, sec. 24, 39, 13, conveyed by Allan Robbins to the Chicago, Burlington and Quincy Railroad Company, called tract A, lying between the east line produced respectively north and southwardly of the west 33 feet of block- 5 and 8 and between the west line produced northwardly of the east 33 feet of block 9, all of said Walker's Douglass Park addition to Chicago, are unknown, having been filed in the office of the clerk of the circuit court of Cook county.

Notice is hereby given to the said unknown owners of all and singular the above-described lots, pieces, and parcels of land and prop-

erty that the petitioner heretofore filed its petition in said court, on the common-law side thereof, praying for the ascertainment of the just compensation to be made for private property to be taken or damaged for opening and widening Rockwell street from West Eighteenth street to West Nineteenth street by condemning therefor the lots, pieces, and parcels of land and property hereinbefore described, and that a summons thereupon issued out of said court against the said defendants and the said unknown owners, returnable at the court-house, in the city of Chicago, in said county, on the third Monday of December next, 1890, as required by law.

Now, unless you, the said unknown owners of the said above-described property, shall personally be and appear before the said circuit court of Cook county on the first day of the term thereof to be held at the court-house, in the city of Chicago, in said county, on the third Monday in December, A. D. 1890, and plead, answer, or demur to the petitioner's petition, the same and the matters and things therein charged and stated will be taken as confessed and a decree entered in accordance with the prayer of said petition.

HENRY BEST, *Clerk.*
JONAS HUTCHINSON,
Corporation Counsel.
FRANCIS E. HALLIGAN,
Special Assistant Attorney.

Chicago, Nov. 13th, 1890.

And afterwards, to wit, on the 5th and 28th days of July, A. D. 1892, the following, among other, proceedings were had and entered of record in said court, to wit:

CITY OF CHICAGO
v. } 86019.
W. A. GOLDEN *et al.*

In the matter of the petition of the City of Chicago for the ascertainment of the just compensation to be made for private property to be taken or damaged for the opening of Rockwell street from West 18th street to West 19th street.

This cause being called for trial, come the parties hereto, by their attorneys, respectively. Thereupon it is ordered that a jury come. Thereupon come the jurors of a jury of good and lawful men, to wit, M. J. Fitch, Nelson H. Patnoe, S. W. Dunlap, Albert L. Burnett, James Tucker, John J. Dohm, August Swanson, H. M. Jewell, H. Madson, William E. Kolm, and Halvert Michelson, who, having been duly selected, examined, and sworn well and truly to ascertain and report just compensation to the owner or owners of the property sought to be taken or damaged by these proceedings and to each person therein interested, according to the facts as they shall be made to appear from the evidence, and having heard the evidence, the arguments of counsel, and the instructions from the court, bring in there verdict, whereby they do say:

Ord., 5th July, 1892.

17 We, the jury, find the just compensation to be paid to the owner or owners of the following-described lots, pieces, and parcels of land and property sought to be taken or damaged by the proposed improvement — as follows, to wit:

In Walker's Douglass Park addition to Chicago, being a subd. of E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ (except railroad land) of sec. 24, T. 39 N., range 13 east, of 3rd P. M.

To the owner or owners of the west 33 ft. of block 5, forty-eight hundred fifty-seven $\frac{75}{100}$ dollars ($4,857.75).

To the owner or owners of the west 33 feet of block 8, sixteen hundred fifty $\frac{00}{100}$ dollars (1,650.00).

To the owner or owners of the east 33 feet of the south 138.7 feet of block 9, eighteen hundred and fifty $\frac{00}{100}$ dollars ($1,850.00).

To the owner or owners of that part of the right of way of the Chicago, Burlington and Quincy Railroad Company being the 33 ft. east of and adjoining the N. and S. center line of the S. E. $\frac{1}{4}$ and between the north line of blocks 8 of said Walker's Douglass Park addition and the south line of block 5 of said Walker's Douglass Park addition, together with that part of the right of way of the Chicago, Burlington and Quincy Railroad Company being the 33 feet west of and adjoining said north and south center line of the S. E. $\frac{1}{4}$ and between a line drawn 138.7 feet north of and parallel to the south line of the N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and the southerly line of said block 5 of Walker's Douglass Park addition produced southwesterly, all in sec. 24, township 39 N., R. 13 east, of the 3rd P. M., one $\frac{00}{100}$ dollars ($1.00).

18 We, the jury, find that the remainder of the premises known as the west 348.25 feet of block five in Walker's Douglass Park addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the west thirty-three feet thereof and the proposed opening and widening of Rockwell street.

And we, the jury, find that the remainder of the premises known as block nine (9), except that part thereof conveyed to the Chicago, Burlington and Quincy Railroad Company in Walker's Douglas Park addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the east thirty-three feet thereof for the proposed opening and widening of Rockwell street.

M. Y. FITCH,
NELSON H. PATNOR,
S. W. DUNLAP,
ALBERT L. BURNETT,
JAMES TUCKER,
JOHN J. DOHM,
AUGUST SWANSON,
H. M. JEWELL,
E. C. BAND,
H. MADSON,
WM. E. HAHN, AND
HALVER MICHELSON, *For-man.*

Thereupon the respondents, by their attorneys, moved for a new trial herein of said cause.

19 *Order, July* 28, '92.

CITY OF CHICAGO *vs.* W. A. GOLDEN *et al.* } 86019. Petition.

In the matter of the petition of the City of Chicago for the ascertainment of the cost of opening and widening Rockwell street from W. 18th street to West 19th street.

This cause coming on this day to be heard, comes the City of Chicago, by its attorney, Charles C. Gilbert, and the Chicago, Burlington and Quincy Railroad Company, by Herrick and Allen, its attorneys; the Chicago Foundry Supply Company, by Julian W. Mack, its attorney, and John T. Snodgrass, by Frank F. Reed, his attorney; whereupon, by motion of the petitioner, by its attorney, the petition herein is amended so that part thereof that reads as follows:

That part of the right of way of the Chicago, Burlington and Quincy Railroad Company and of the 4.72 acres of the S. E. ¼ section 24, 39, 13, conveyed by Allen Robbins to the C., B. and Q. R. R. Co., called tract "A," lying between the east line produced respectively northwardly and southwardly of the west 33 feet of blocks 5 and 8, and between the west line produced northwardly of the east 33 feet of block 9, all of said Walker'- Douglas Park addition to Chicago, may read as follows, to wit:

That part of the right of way of the Chicago, Burlington and Quincy Railroad Company, being the 33 feet east of and adjoining the N. and S. center line of the S. E. ¼ and between the north line of block 8 of said Walker's Douglas Park addition and the south line of block 5 of said Walker's Douglas Park addition, together with that part of the right of way of the Chicago, Burlington
20 and Quincy Railroad Company, being the 33 feet west of and adjoining said north and south center line of the S. E. ¼ and between a line drawn 138.7 feet north of and parallel to the south line of the N. E. ¼ and the southerly line of said block 5 of Walker's Douglas Park addition produced southwesterly, all in section 24, t'w'p 39 no., R. 13 east, of the 3rd P. M.

And this cause coming on to be heard upon the motion of the respondents to set aside the verdict of the jury heretofore rendered herein, *and* the court, having heard the arguments of counsel and being now fully advised in the premises, doth overrule and deny said motion; to which ruling of the court the said respondents duly except.

And thereupon the said City of Chicago, by its said attorney, moves for judgment upon said verdict, and, the court being fully advised in the premises, it is considered and adjudged by the court that the respective sums of money awarded by the jury in and by

their said verdict to the owner or owners of said lots, pieces, and parcels of land and property are and each of them is a just compensation to the owner or owners thereof for the taking and damaging of such lots, pieces, and parcels of land and property by the proposed public improvement mentioned in said petition, and said owner or owners shall respectively accept from said city of Chicago such sum or sums as are so awarded on account of the lots, pieces, and parcels of land and property so owner by them respectively, all of said lots, pieces, and parcels of land and property being in the city of Chicago, county of Cook, and State of Illinois, and that upon
21 payment to the county treasurer of Cook county, Illinois, by the said city of Chicago of the said several sums of money for the use of the owner or owners of any or each of the said lots, pieces, and parcels of land and property, or upon proof made to or before the court that the said sums of money or any of them have been paid to the owner or owners respectively of said lots, pieces, and parcels of land and property, the city of Chicago shall have the right at any time thereafter to take possession of and damage the property in respect to which such compensation shall have been so paid or deposited.

To which decision of the court and the entry of said judgment the respondent The Chicago, Burlington and Quincy Railroad Company, by its attorney, duly excepted and pray- an appeal to the supreme court of Illinois, which is by the court allowed upon its filing an appeal bond in the penal sum of $250, together with its bill of exceptions, by Sept. 24, 1892.

And afterwards, to wit, on the 24th day of September, A. D. 1892, there was filed in said court a certain bill of exceptions as follows:

22 STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County, June Term, A. D. 1892.

CITY OF CHICAGO
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, THE CHICAGO FOUNDRY SUPPLY COMPANY, and JOHN T. SNODGRASS.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 30th day of June, A. D. 1892, being one of the days of said term of said court, before his honor Frank Baker, one of the judges of said court, presiding on the common-law side thereof, and a jury, this cause came on for trial upon the pleadings heretofore filed herein, Messrs. Gilbert and Thorn appearing for the petitioner; J. J. Herrick and C. M. Dawes, Esqs, appearing for the defendant The Chicago, Burlington & Quincy Railroad Co.; F. F. Reed, Esq., appearing for the defendant Snodgrass, and J. W. Mack, Esq., appearing for the defendant The Chicago Foundry Supply Company.

The motion of the respondent The Chicago, Burlington & Quincy Railroad Company heretofore filed in said cause came on to be heard; which motion was in the words and figures following, to wit:

23 And now comes The Chicago, Burlington & Quincy Railroad Company, by John J. Herrick and Chester M. Dawes, its attorneys, and moves the court to require The City of Chicago, the petitioner, to furnish and file in this court a plan definitely specifying and designating or otherwise to state and specify of record in what manner and at what grade and level with reference to the grade and level of the railroad of this defendant the said Rockwell street will be extended and opened across the said right of way and railroad of the defendant The Chicago, Burlington & Quincy Railroad Company.

And thereupon the court denied said motion; to which ruling of the court counsel for said respondent, The Chicago, Burlington & Quincy Railroad Company, then and there duly excepted.

And thereupon the further motion of the respondent The Chicago, Burlington & Quincy Railroad Company, heretofore filed, came on to be heard; which motion was in the words and figures following, to wit:

And now comes the Chicago, Burlington & Quincy Railroad Company, by John J. Herrick and Chester M. Dawes, its attorneys, and move- the court to require The City of Chicago, the petitioner, to state or otherwise specify of record whether the right sought to be acquired to cross the right of way of the respondent The Chicago, Burlington & Quincy Railroad Company is a right to cross the same subject to a right in said company to lay such other tracks on said right of way as it may see fit in addition to those already

24 laid thereon, or whether the right sought to be acquired is to be subject only to the use of this respondent of the railroad tracks laid and in use on said land at the time said petition was filed.

And thereupon the court denied said motion; to which ruling of the court in denying said motion the respondent The Chicago, Burlington & Quincy Railroad Company then and there duly excepted.

And thereupon the petitioner, to maintain the issues on its part, introduced the following evidence, to wit:

After the jury was empanelled the trial of this case was adjourned until July 1st, 1892, at 10 a. m.

1st. The ordinance attached to the petition, the certificate of the city clerk and endorsements thereon; to which testimony and each and every part thereof the respondent The Chicago, Burlington and Quincy Railroad Company objected as incompetent and immaterial; which objection was overruled by the court; to which ruling of the court counsel for respondents then and there duly excepted.

JULY 1ST, 1892—10 a. m.

Court met pursuant to adjournment.

W. A. GOLDEN, having been first duly sworn on behalf of the objectors herein out of order, was examined in chief by Mr. Read and testified as follows:

Q. What is your name?
A. W. A. Golden.
Q. What is your business?
A. At present real estate.
Q. How long have you been in that business?
A. Two or three months.
Q. Prior to that what was it?
A. I was with the Sillicon Decoration Company.
Q. How long were you with them?
A. About eighteen months.
Q. Prior to that what was your business?
A. Coal and feed, hay, grain, etc.
Q. Where?
A. At last 910 Lake street.
Q. How long were you in that business?
A. Five years.

Q. I wish you would state your familiarity with property in the vicinity of the crossing of the C., B. & Q. and Pan Handle tracks in west Chicago.

A. About seven years ago I had occasion to look up a piece of property for the purpose of a grain elevator, and in looking around for a piece of property I became familiar with the property in that vicinity.

Q. Did you then examine the property in that vicinity?
A. I did.

Q. Continueing subsequnet to that date, what investigation did you make or what familiarity did you get with this property?

A. I purchased what is now occupied by the railroad of block 1.
Q. Of what?
A. Of Walker's Douglass Park addition to Chicago which lays north of the tracks there.

Q. Let me show you one of these plats which the jury have and just indicate what it was that you purchased.

A. I purchased that piece bounded on the north by 18th and on the west by Rockwell, on the south by the C., B. & Q., and on the east by the ground owned by the Pan Handle road.

Q. How is it marked on this palt?
A. It is marked 5 there, which I suppose is meant to be block 5.
Q. How long did you hold that?
A. I held that something over four years.
Q. When, if ever, did you sell it?
A. I sold it in December, 1889.

Q. I call your attention specifically to that part of block 9 of Walker's Douglass Park addition to Chicago not heretofore conveyed to the

C., B. & Q. R. R. Co. It comprises all of said block except the triangular piece which is bounded on the north side by the railroad, on the east by a line north and south, which is 78 and $\frac{5}{10}$ feet in length from the railroad right of way south, thence running due west on a line parallel with the south line of said block 9 until it intersects with the railroad's right of way. I call your attention to that property. Are you familiar with it?

A. I am; yes, sir.

27 Q. How long have you known it?

A. For seven years.

Q. When you made this investigation of which you speak did you examine this property?

A. I did.

Q. For what, in your opinion, is this property which I have just described to you adopted?

A. Well, that property is pretty nearly well adapted for a grain elevator, a brewery, or malt-house, or for manufacturing business of most any kind for which it is large enough and wishing railroad facilities.

Q. For what, in your judgment, is it best adapted?

A. It is as well adapted as anything for grain-elevator cleaners.

Q. State your reasons why.

A. Because you get a large length of switching to a small piece of ground and on account of its being located on the Burlington, which is one of the best, if not the best, leading to the West, Northwest, and Southwest, bringing grain into Chicago, and also having connection with the Pan Handle, which is one of the best roads for shipping into the country where a man would be likely to want to send his products.

Q. I wish you would state, if you know, about how much there is contained in this tract, which we will call the Snodgras- tract for short. About how much land is there in the Snodgrass tract?

A. In square feet somewhere about 70,000.

Q. About how much does that make in acres?

28 A. I did not figure it up that way; somewhere between an acre and a half and three quarters, I should think.

Q. Are you familiar with the strip of land off the east end of that Snodgrass piece and the Snodgrass piece which is 1,238 and $\frac{7}{10}$ feet in length from north to south and 36 feet in breadth from east to west?

A. I am.

Q. Do you know what was the value of that last strip of land on the 12th of November, A. D. 1890?

A. That little strip; what the value of that would be?

Q. Yes, sir; the market value at that time, taken as part of the whole as it lays there.

A. I should say that piece of ground out there ought to be worth at that time $100 a foot.

Q. Fronting east and west?

A. On 19th street.

Q. That would make $1,300 the value of that strip?

A. Yes, sir.

Q. Now, I wish you would examine the plat. Keep in mind the entire Snodgrass tract; keep in mind the fact that by this proceeding it is sought to appropriate the east 33 feet of that tract, and tell us whether or not the taking of that east 33 feet of the Snodgrass tract will injure or depreciate the value of the untaken portion, the rest of block 9.

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. I would say that it would.

Q. To what extent?

29 Objected to by counsel for petitioner as incompetent and immaterial; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Oh, $2,000.

Q. On what do you base that estimate?

A. I base the estimate on the fact it would cut the switching facility; taking that off it makes room for one car less to stand there, and that would for some purposes depreciate the amount of switching that could be done there one-tenth—depreciate the amount of cars a man could handle on any one switch one-tenth.

Q. Would it depreciate the value to that extent for elevator purposes?

A. It would.

Q. Now, give your opinion as to the value of the entire Snodgrass tract on 12th of November, 1890.

A. Oh, it would be worth for some purposes at that time probably——

The COURT: In the market for the best purposes?

Mr. READ: For the best purposes.

The COURT: What, in your judgment, would be a fair price; what would it bring?

A. $20,000, I should say.

Mr. READ: I wish you would state whether, in your opinion, or not, — Rockwell is opened from 19th street north to West 18th street it will be of any benefit to the Snodgrass tract.

A. It would not, for a shipping elevator.

30 The COURT: We do not care anything about that. You must settle that. You are the expert. Will it benefit the market value of the tract in your judgment?

A. I think it would not benefit it.

Mr. READ: Are you familiar with the locality out there as it lies?

A. I am; yes, sir.

Q. I will ask you whether or not 19th street is used as a street—West 19th.

A. West 19th street will be used as a street.

Q. How about Washtenaw avenue?

A. That is used as a street.

Q. Has this tract any frontage on Washtenaw avenue?

A. Yes, sir.

Q. How much?

A. Less than forty feet.

Q. Just state in a general way how Washtenaw avenue is as a thoroughfare.

A. Washtenaw is the best north and south thoroughfare between Western avenue and California.

Q. Is Rockwell street open from 19th street south for any distance?

A. I suppose it is. I have not examined the plat with that particular question in view.

Q. I will ask you to state the facts in reference to the necessity of large switching facilities for a grain elevator or malt-house.

A. For a grain elevator a person wants large switching facilities for the reason there is times grain is below the average price,
31 what they call cheap days, and parties in the business want to buy and handle as much cheap grain as they can. Sometimes there is a great deal of grain coming here that is out of condition. It accumulates on the market, being a little damp or dirty, and sells at a low relative value as compared with better grades. Then a person wants good track facilities to handle as much as possible in a short length of time.

Q. Are you aware, Mr. Golden, there is what is called a Y switch, running from the Burlington track, the south side of them?

A. I was aware of that.

Q. Around to the Pan Handle?

A. Yes, sir.

Q. Is that shown on the plat to the jury?

A. That is shown on the plat there.

Q. I will ask you what effect, if any, the opening of Rockwell would have on access to that Y track from this Snodgrass tract.

A. It is liable to cut off the eastern connection with the Pan Handle road by the Y and cost extra switching.

Q. I want to ask you whether your estimate of the damage to this tract by the opening of this street included that possible cutting off of the connection or was based simply on the dimunition of the switching capacity of the tract itself.

Objected to by counsel for petitioner as incompetent and
32 immeterial; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Did your estimate of damages include this possible cutting off of connection with the Pan Handle tracks?

Objected to by counsel for petitioner as incompetent and immaterial.

The COURT: We cannot go to work and say one item is so much, and then another item, and then another item and another item,

and then sum up. The question for the witness is, what will be the effect of the taking of this part upon the value of the remainder? and the rest of it may be all reason for that opinion.

Mr. READ: A man who is an expert on one subject is not necessarily an expert on all subjects. My theory is this, that by simply cutting off a car-length of switching by taking 33 feet there is a certain damage. I call him as an expert on that, but I also maintain the position that if it cuts off a connection with an eastern road it shows an extra damage. He is not an expert on that, but I propose to produce one who is.

The COURT: Then we will strike out all the testimony. I do not propose to have a man come on here and say I cut out this for this man and that for that man. If he is not an expert, he ought not to be called.

Mr. READ: He may be on one branch competent and not on another.

The COURT: When he testifies to the damages to the remainder of the tract, it is for him to allow the damages. If he cannot
33 make the allowance for all, he cannot testify.

Mr. READ: He can testify to the damage of the tract and testify to the basis of his judgment?

The COURT: Yes, sir.

Mr. READ: State the basis——

The COURT: You asked him his reasons for his opinion. He has been giving those.

Mr. READ: I want him to state all his reasons for estimating it.

The COURT: All right.

Mr. READ: Please state the entire basis for all your reasons for estimating the damage to the balance of the Snodgrass tract at $2,000 by this taking.

A. It is on account of the loss of switching that I make that estimate; on account of not being able to handle as many cars with the portion of the tract as you could with the whole of it.

Q. Do you know what John T. Snodgrass' business is?

A. I do; yes, sir.

Q. What is it?

A. He is a shipper of grain.

Q. Here in Chicago?

A. In Chicago; yes, sir.

Q. Do you know how long he has been in that business?

A. I don't.

The COURT: I don't think that is material.

34 Cross-examination.

By Mr. GILBERT:

Q. What is your business?

A. At present I am a real-estate broker.

Q. How long have you been in the real-estate business?

A. As a business only two or three months—just a little while.

Q. Is there any elevator on block 9 now?
A. There is not; no, sir.
Q. Have you ever been in the elevator business?
A. I have been in the elevator business; yes, sir.
Q. When?
A. I left in 1881.
Q. How long have you been in that business?
A. I have been in the business fifteen years.
Q. For yourself?
A. Yes, sir.
Q. Where?
A. Sterling, Illinois.
Q. Did you own an elevator there?
A. I did.
Q. How many?
A. Only one.
Q. How large was it?
A. The capacity of that elevator was about 50,000 bushels.
Q. I mean the area?
A. It was 24 by 90 feet.
Q. Sterling is a small country town?
A. Yes; it was a country elevator. That is what it was.
Q. And it wouldn't class with the elevators in Chicago?
A. No; it wouldn't apply to elevators in Chicago.
35 Q. How far is the Y switch from the north line of the tract we are now condemning?
A. How far is the Y switch from the south line?
Q. From the north line of the tract.
A. How far from the north line of the tract?
Q. Yes, sir.
A. Why, I should judge it was 100 feet, perhaps.
Q. 100 feet?
A. Yes, sir; I may be off on that. Right near the Y.
Q. Is that right near the Y?
A. Well, that would depend on what part of that Y I should take my measurement from. I can make it a great deal less than that or a great deal more.
Q. How far is the switch and the north line apart, considering the nearest point?
A. I do not know for certain where it joins the main track. It is only from these across the right of way where the tracks are laid, and there have been tracks laid since I was there.
Mr. READ: I do not think the witness understands you, Mr. Gilbert. Point it out.
Mr. GILBERT: Would you say there are 150 feet of this Y track on the lot we are now condemning?
A. I would think there was without looking at any plat or map. That would be my guess. Hold on. On the lot that you are condemning?
Q. Both that and adjoining.
36 A. The lot you are condemning and adjoining would do.

Q. 150 feet?

A. I didn't suppose there was 150 feet.

Q. What is your opinion based on?

A. Just recollection only.

Q. What is your recollection of it? That is near enough. I do not want it to an exact foot.

A. I never looked at it with that view—with that question in view.

Q. In your judgment it would be at least 100 feet?

A. We will say from 100 to 150 feet.

Q. You still think that the opening of this street as we propose to open it will obstruct the use of that switch in making connection with any structure that might be put on block 9 as you have contemplated?

A. I would suppose it is likely to.

Q. Would it as a physical fact?

A. Yes, sir; it would obstruct the use of that.

Q. Then you would say it would?

A. Yes, sir; I would say it would.

Q. Now, would you say that it would prevent the connection with the side track—with any structure that might be placed upon it?

A. You are asking now in regard to the Y that is already there?

Q. Yes, sir.

A. It is not necessary for it to.

Q. What do you say as a physical fact? Will the opening
37 of the street prevent the connection?

A. Not the opening of the street.

Q. Between the switch and any structure or elevator that might be placed on that ground, block 9?

A. Are you speaking of a switch or that Y?

Q. I am speaking of the switch.

A. You said the Y.

Q. Well, that is the Y.

A. Well, it would not obstruct it.

Q. It would not?

A. Not necessarily.

Q. How do you say that the opening of the street, as we propose to open it, would depreciate the value of the remainder of block 9 to the extent of $2,000?

A. Because in making a switch the switch would lay the length of the ground, and it is necessary in doing a grain business or something of that kind to unload your cars at a point, and you have to have a place to dispose of your empty cars before you run another car down, and that street being taken off 33 feet takes off a car-length.

Q. The fact of a car-length being taken off—that you would be deprived of putting an extra car there—would depreciate the market value to the extent of $2,000?

A. Yes, sir; for that purpose.

Q. Do I understand you to say that every car that you could stand upon a switch would be $2,000 off that ground?

A. Not every car you could stand on the switch, because it is easy to have two tracks, and every car you have on a switch
38 loaded you have to have a car-length on an empty switch take care of your car.

Q. But the fact that you would be deprived of a car-length of switching will injure the remainder to the extent of $2,000?

A. It will injure the remainder to the extent of $2,000 for that purpose.

Q. Now, suppose it were wider and we deprived you of two car-lengths of switching, would that add another two thousand?

A. That would add another two thousand.

Q. And another would add another two thousand?

A. We might say another. We will get it down pretty soon so it will be practically worthless for that business. A man don't want to run a cleaner elevator unless he has room for five or six cars.

Q. How deep is block 9?

A. Which way do you mean by that?

Q. East and west.

A. If I remember right, it is 624 feet or about that, or 634.

Q. In your idea of this matter did you propose to store your empty cars or the cars that were loaded on the right of way of the C., B. & Q.?

A. No; I would not expect to do either on the right of way of the C., B. & Q.

Q. Where would you store the cars?

A. To do a grain business the elevator would necessarily stand at the center of the ground. In putting in a switch of cars
39 the car would have to be switched in—the loaded car—so that the loaded car would not be unloaded on the other side, and then as your car is unloaded you must have a track room to push that car away before you have room for another loaded car, and you cannot unload any more cars on that switch than you have ground to take care of your empty cars.

Q. How large an elevator in area would you build on block 9?

A. That would depend on the amount of business that I expected to do.

Q. What is the lot adapted to? What sized elevator would it be adopted to?

A. That lot is not adopted to a building any longer than the lot is wide at the center. I do not know just what that is without figuring. You may have it on the map, and then you would have to extend it each way from that large enough to take in your proposed storage and handling capacity.

Q. The length north and south is 138.7 feet.

Mr. READ: That is the widest part.

Mr. GILBERT: Now, what would be the east and west dimensions of your proposed elevator?

A. If you build a one-car house?

Q. No; take the ground, the most advantageous use of it.

A. You would have 634 feet, the full length of the ground, if you took none away.

Q. You would build an elevator the entire length east and west?

A. I would build an elevator if I was going to build for grain; no; I wouldn't build for storage capacity. I would build
40 it the other way, but you can build it the entire length.

Q. You would build the entire length north and south?

A. North and south.

Q. What would be that length north and south, the entire length of the block?

A. Yes, sir; for a one-car house, if I wanted that amount of storage for one house.

Q. That is 138.7 feet?

A. Yes, sir.

Q. Then to get the best use of the lot you would place the elevator 138.7 north and south?

A. Yes, sir; that is the way I should place it.

Q. And how many feet east and west?

A. For a one car 36 feet.

Q. For the best purposes of utilizing the lot in the best way you know how, how wide would the elevator be east and west?

A. Utilize the ground to the best use I know how, I would calculate it to be 120 feet.

Q. If the 33 feet east is taken away would you not have room to store your cars on the remaining 630 feet east and west?

A. You would not have room to store as many cars, to handle as many cars on that, two on each track.

Mr. READ: I object to that. It is not 630 feet.

Mr. GILBERT: Well, 601 feet, then. You would have the 601 feet. Wouldn't that be sufficient for the storage of your cars?

A. That depends on how many cars you want to handle.

41 The COURT: I do not see what progress we are making in this.

Mr. GILBERT: Would you or not have sufficient room to store cars for the purposes of the elevator that you have described?

A. At times there would be, and at times there would not be.

Q. At what time, in your judgment, would that not be sufficient?

A. In either case, when a man wishes to receive considerable grain in the shortest time possible or to ship a great deal of grain in the shortest time possible.

Q. And the proposed opening would deprive you of simply one car's length?

A. (Not answered.)

Q. Where upon the track would the cars be stored? First let me ask you this question: How would the railroad tracks lay with reference to the elevator?

A. They would lay in reference to the elevator?

Q. Yes, sir.

A. The railroad tracks would be on the north end of the elevator or the north side.

Q. How many tracks would you have there?

A. To do a good, fair business I should put in two tracks.

Q. Would you have any tracks in the center of the elevator?

A. For me I wouldn't run tracks through an elevator. Then I would like to correct one statement that I guess I made. I made the statement that I would make my elevator 138 feet long. I could not do so because in using two tracks I would have to take off the length of the tracks.

42 Mr. READ: Or else run the tracks through the elevator?

A. Yes, sir; or else run the tracks through the elevator.

Mr. GILBERT: Can you state, Mr. Golden, about how often in the course of a year this so-called shortage of track facilities would occur?

A. There could not be any definite explanation made of that. It is liable to occur any time. A man buys a lot of grain and gets it together and cleaned in shape. He ships so many cars, provided he can ship it in a certain length of time.

Q. That is entirely a matter of speculation?

A. Yes, sir; entirely so.

Q. Do you mean to say that estimate is purely a matter of speculation?

A. Which estimate do you mean?

Q. About the frequency of the occurrance.

A. Yes, sir; it is a matter of speculation. It may occur on an average once or twice a month, or may not occur but three or four times in the course of a year, receiving in and shipping out, and sometimes for ninety days right along a man wants to handle all he can every day. I would make a little explanation of that if you want any.

The COURT: You don't know more specifically?

A. No, sir; but if a man was drying corn there is not a day since the first of January but he wishes to rush his dryer every day.

43 Redirect examination.

By Mr. READ:

Q. I wish you would examine this plat. I call your attention to the location of the Y on it. Examine that. You stated in answer to counsel that you could get from that Y into the rest of block 9, the Snodgrass tract, even if the street were opened. Tell us how you would have to *to* come into it from the curve or slant.

A. From the Y?

Q. Yes, sir.

A. That is something that requires the services of an engineer, perhaps, and I am not an engineer.

The COURT: If you are not an engineer and have special knowledge of it that is the end of it.

Mr. READ: He can state how to get into it.

The COURT: No; if he is not an engineer and is speculating about it, the jury knows as well as he does.

Mr. READ: When you gave an answer to that question, what were you considering?

A. I considered that that track would remain there just as it is, and as to the Y that can be Y'd from that track right across.

Q. And across the street?

A. Yes, sir; across the street.

Q. In order to put the elevator in the way you described, it wouldn't make any difference whether you ran these tracks through the elevator or north of the elevator, this proposed taking
44 of the 33 feet would diminish the track or switching room just the same?

A. Yes, sir.

G. H. BREMNER, a witness called on behalf of the objector, having been duly sworn, was examined in chief by Mr. Herrick and testified as follows:

Q. What is your name?

A. G. H. Bremner.

Q. What is your business?

A. Civil engineer.

Q. Are you connected with the Chicago, Burlington & Quincy Railroad Company?

A. I am in their employ.

Q. I show you a plat. It is identified as Exhibit A. Was that plat prepared by you?

A. Yes, sir.

Q. Does that show the proposed opening of Rockwell street across the property of the Chicago, Burlington & Quincy Railroad Company and the adjoining property?

A. It does.

Q. Correctly?

A. Yes, sir.

Q. Please state the length of the proposed street or that part of the proposed street included in the C., B. & Q. property—that is, within the blue lines.

A. The whole property from here to here (indicating)?

Q. Yes, sir; the extreme blue line.

A. Here it is, 161 and a half feet.

Q. What is the total area?

A. The total area is 10,798 square feet.

45 Q. What is the distance from the south blue line to the first blue line north of it, measuring along the center of the street?

A. 78 and one-half feet.

Q. And from that point to the northernmost blue line?

A. 83 feet. It may vary slightly from that, such as 100 or two. That is it in round numbers.

Q. What is the area of that part of the whole tract lying between the south blue line and the blue line next north of it?

A. 1,517 square feet.

Q. And the remainder of the tract north of that?

A. 5,481 square feet.

Q. What is the total area of this tract marked "Tract A" here?
A. The total area of tract A is 4 and $\frac{72}{100}$ acres. Excuse me. Do you mean just tract A itself, or the whole of that property?
Q. I mean simply tract A.
A. Yes, sir.
Q. Is that map made on a scale?
A. It is; 50 feet to an inch.

The COURT: What is the property surrounded by, railroads?
Mr. HERRICK: No; there are three or four different pieces here.

The COURT: It is tract A?
A. From this line to this dotted line over here, and the Pan Handle track running down here, a distance of 1,015 feet, from that point on that curved line here (indicating).
Mr. HERRICK: Take the tract which lies immediately west of tract A, marked here tract C. Have you calculated the area of that?
A. It is one-half of an acre.
46 The COURT: A little tract there?
A. It lies west of the center of the street, one-half an acre.

Examination.

By Mr. READ:

Q. Will you give me the length of the line, starting at the south line of the Chicago, Burlington & Quincy Railroad Company's right of way and running due east and west to the center of the proposed street cutting off a portion of block 9?
A. It is 279 and $\frac{1}{2}$ feet.
Q. I will ask you if you are familiar with railroad engineering.
A. Yes, sir.
Q. The construction of switches?
A. Yes, sir.
Q. Suppose there were a grain elevator on block 9, how should the switches run to get the best advantage—east and west or north and south?

Objected to by counsel for petitioner.

The COURT: You wouldn't make a switch at right angles to the track, would you?
A. No, sir.
Q. Whether it was for a grain elevator or a cemetery, unless you wanted to furnish subjects; but let him answer.
Mr. READ: Answer the question.
A. You mean track instead of switch?
Q. Yes, sir; in 9.
A. It is east and west.
Q. If you wanted to get at the tract marked 9 here, the Snodgrass tract, as it is called, from the Pan Handle Y, how would you naturally switch—run a track to the best advantage?

47 Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Towards the west.

Q. Could you do it to any advantage if you began at the west line of the proposed street, right there (indicating)?

A. You could not.

Q. The best advantage would be to run it out almost due east and west and strike somewhere about the center of block 8?

A. Yes, sir; tract A.

Q. And to do that after the street was opened you would have to cross the street?

A. Yes, sir.

Mr. HERRICK: I believe I asked you, Mr. Bremner, whether the blue lines here show the Chicago, Burlington & Quincy Railroad Company's property.

A. Yes, sir.

Q. The blue mark over the red?

A. Yes, sir; the blue over the red shows the Burlington's property.

Q. The boundaries of their property?

A. Yes, sir.

Cross-examination.

By Mr. GILBERT:

Q. Your idea was in building the tracks on block 9 you would run them through the center of the elevator—is that so—building them east and west?

48 A. It would make no difference whether you run through the front of the elevator or the side of the elevator. The tracks would have to run, to use the ground to the best advantage—would have to run east and west or nearly so; somewhere in that direction.

Q. Now, if the north line of block 9 was 630 feet or 601 feet, as it will be after the improvement is made, wouldn't there be room, as a matter of fact——

The COURT: The testimony is 278.

Mr. GILBERT: No; that *it* the switching. The block is 630 feet; but now if you have a north line, being 601 feet, couldn't you run your switch from the elevator, supposing it to be in or near the center, up to the Y switch?

A. I cannot answer that off-hand, because you might be able to run the switch up there and you might not. It would depend altogether on the radius of curvature you would have to put in to get your switch there. It does not look like a very practical scheme, and yet it might be done. I cannot answer it off-hand.

Q. The radius west of Rockwell street is the same as the radius east of Rockwell street; that is a fact, is it not, as indicated here on the plat? Is not that radius the same?

A. No; it is not.

The COURT: That Y.

Mr. GILBERT: The radius is just the same exactly.

A. No; as a matter of fact it is not the same.

Q. *Is* there a difference?

49 A. Yes, sir; the tracks curve a little more at this point than down here (indicating).

Q. There is a sharper curve on the east side than the west?

A. On the west than on the east.

Q. If that is so, and your elevator was in the south of block 9 and your track on the north and parallel with the Y, you could make a connection there with the Y, couldn't you, from the elevator? In other words, it wouldn't be necessary to run east and west across Rockwell?

A. Not directly east and west.

Q. And it would not be necessary to go across Rockwell street at all? You could make your connection with the Y all within block 9 without going on Rockwell street?

A. I do not believe that you could. Well, I don't know what location you get for your elevator.

Q. The elevator is south of the center?

The COURT: Is there an elevator there now?

Mr. GILBERT: No; but that is the scheme. Suppose the elevator is south of the center of block 9; that is 601 feet this way—east and west.

Mr. THORN: They would build their switch-track along by the elevator and run the switch-track to the Y here (indicating). Couldn't they make a connection with the Y here north of the elevator and parallel with these as well as upon block 9 as they can upon any portion of Rockwell street?

Mr. GILBERT: Without going across Rockwell street?

50 A. You would have to make connection with this track over here. You couldn't connect with that track.

Mr. READ: You mean by that what?

A. The track that connects with—the main track of the C., B. & Q.

Mr. THORN: You would have to cross Rockwell street to get the proposed connection there?

A. Yes, sir.

Mr. READ: In making the proposed connection between the switch-tracks that might be laid in block 9 would it be any advantage, or would the connection be made any better with this Y, if you had 33 feet additional to make it in instead of cutting off? If you had 33 feet more from that point there to that point there, could you make it better?

Q. Which way?

Q. Could you make a better connection with that Y from that point, where the center of the proposed street now intersects it, than from the point where the east line of the proposed street intersects it?

A. You would have more distance. You could; yes, sir.

Mr. GILBERT: Now, assuming, Mr. Bremner, that the owner of block 9, whose ownership extends to that line, the center of the proposed street, does not own the adjoining strip, would it not be more advantageous to make the switch connection entirely on block 9? Suppose there were an elevator here near the southern boundary of block 9, making the connection at the west end of block 9—
51 supposing he had no right to cross this strip here?

A. I do not know. I cannot draw up imaginary plans like that, rough-shod. If I were drawing up a plan to locate an elevator and locate tracks to use the land to the *base* advantage, it would take half a day to a day or maybe more—several days—to draw the plans for it.

The COURT: You would have to work it out by rule of thumb to a certain extent?

A. Yes, sir.

Mr. GILBERT: The testimony you have given with respect to the switch has been extempore, has it not?

The COURT: You need not answer that.

Mr. GILBERT: That is a question that you have not considered before you came into court?

The COURT: You need not answer that.

Mr. GILBERT: You do not know Mr. Read, the attorney?

A. No, sir; I haven't the pleasure.

Q. You do not know the owner of the property, block 9?

A. No, sir.

Q. Or any party interested?

A. No, sir.

Mr. READ: And never talked with us, did you, until you got on the witness stand?

A. No, sir.

C. B. WILSON, called as a witness on behalf of the petitioner, having been first duly sworn, was examined in chief by Mr. Gilbert and testified as follows:

52 Q. Mr. Wilson, you know about this proceeding? It is the opening and widening of Rockwell street between West 18th and 19th street?

A. Yes, sir.

Q. What is your business?

A. Real-estate dealer.

Q. How long have you been in that business?

A. A little over twenty years.

Q. In the city of Chicago?

A. Yes, sir.

Q. Are you familiar with the value of property in the neighborhood of this proposed improvement?

A. I am.

Q. The petition in this case was filed November 12th, 1890. Confining your attention to that date, what was the fair cash value of the west 33 feet of block 5 in Walker's Douglass Park addition to

Chicago, considering that as a part of the whole, for the best uses and purposes to which that strip could be put?

A. $4,318.

Q. The next strip, Mr. Wilson, is the west 33 feet of block 8 in Walker's Douglass Park addition to Chicago.

The COURT: That is south of that curved Y and running to the middle of the proposed street.

Mr. GILBERT: That is right. What was the fair cash value of that strip, Mr. Wilson, on the date of filing the petition, considered as part of the whole tract, and for the best uses and purposes to which it could be put?

A. $1,650.

Q. Mr. Wilson, taking these two pieces that you have just
53 testified to, are they more valuable standing alone as separate and distinct pieces or as parts of the whole?

A. As parts of the whole.

Q. That is the most valuable?

A. Yes, sir.

Q. The next is the south 138 and $\frac{7}{10}$ feet of the east 33 feet of block 9. What was the fair cash market value of that strip at the time of filing this petition for the best uses and purposes to which it is adapted, considered as part of the whole?

A. $1,650.

Mr. THORN: Now, Mr. Wilson, what is the value of so much, if any, of the use of the following-described strip of land for the purposes of a railway company as is taken for the purposes of a public street, namely, that part of the right of way of the Chicago, Burlington & Quincy Railroad Company lying south of the north line of the main right of way of the Chicago, Burlington & Quincy Railroad Company and north of a line drawn parallel to and 138 feet north of the south line of block 9 and the south line of block 9 produced eastwardly and lying west of the west line of block 8 produced northwardly and the west line of the east 33 feet of block 9 and the west line of the east 33 feet of block 9 produced northwardly, all in Walker's Douglass Park addition to Chicago?

Objected to by counsel for respondent The Chicago, Burlington & Quincy R. R. Company; which objection was overruled by the court; to which ruling of the court counsel for respondents then and there excepted.

54 A. Merely nominal, subject to the right of the railway company—one dollar.

The COURT: It is the whole right of way between the south line of the Y and the north line of the main track, between what is marked the railroad fence?

A. Yes, sir.

Mr. THORN: Now, indicate by words the property that you have in mind in answering the question that was last put to you.

A. I can describe it on this map. It is the tract of land lying between this point, this point, this point, and that point (indicating).

Q. Describe it in words.

A. It is the piece of ground 66 feet wide running south from the north line of the Chicago, Burlington & Quincy Railroad Company's right of way to the south line, where it is marked railroad fence on the plat, 138 feet north of 19th street, being 66 feet by about 164 on an average.

Cross-examination.

By Mr. MACK:

Q. Mr. Wilson, how did you get the calculation of $4,318 as the value of the west 33 feet of block 5?

A. I reduced it to square feet, and took as a basis of my calculation a lot 25 by 125 feet at $50 a front foot fronting 18th street, which makes it 40 cents a square foot. The number of square feet in this part taken is 10,795.

Q. 10,795 feet at 40 cents a square foot?

A. Yes, sir.

55 Q. Considered as part of the whole tract?

A. Yes, sir.

Q. I understand you to say that the whole tract is worth 40 cents a square foot?

A. It is, in my opinion.

Q. What is the best purpose, in your opinion, to which this tract, 33 feet wide off the west side of block 5, can be put?

A. This piece alone?

Q. That piece considered alone.

A. I guess the best purpose it can be put to is a street.

Q. Well, apart from a street, what other good purpose could it be put to, considered alone?

A. It could be divided and the piece fronting 18th street could be used seperately, but the part south of that by itself would be of very little value.

Q. Dividing it, then, and taking the piece fronting on 18th street, giving it a depth of 125 feet for a lot and 16 feet for an alley—that is, taking off the north 141 feet, what would be the best purpose to which that lot fronting on the corner of Rockwell and 18th streets as it now stands could be put?

A. A saloon.

Q. And what would be the value, in your opinion, of that corner, 33 feet fronting on 18th by 125 feet deep, and the 16-foot alley, as a saloon?

A. Fifty dollars a foot.

Q. Fifty dollars a foot?

A. Is the highest possible price you could put on it; that piece standing alone.

56 Q. Have you any knowledge, Mr. Wilson, of any purchases or sales in this vicinity of corner property?

A. I have the opposite corner for sale.

Q. You have the opposite corner for sale?

A. Yes, sir.

Cross-examination.

By Mr. READ:

Q. Mr. Wilson, you put a valuation on the strip 33 feet wide from east to west and 139 and $\frac{7}{10}$ long from north to south off block 9?

A. Yes, sir.

Q. What is the basis of that valuation?

A. On the basis of $50 a foot fronting 19th street.

Q. How many square feet did you make in it?

A. I believe I have got the square feet, although I did not take that as the basis. There are 4,578½ square feet, according to my figuring. According to your figures it would be a trifle less. You make the line there one foot less, as I understand, than it is marked on this plat.

Q. You did not compute this estimate on the basis of so much a square foot?

A. No, sir; I didn't.

Q. The estimate of the strip taken from the west side of block 5 you computed on the basis of square feet?

A. Yes, sir.

Q. How much a square foot?

A. 40 cents.

57 Q. How much a front foot?

A. As I explained in my answer, it was on the basis of $50 a front foot for a lot 25 by 125, fronting 18th street.

The COURT: And your estimate is for 138 or 9 feet, whatever it might be?

A. Yes, sir. This other lot, block 5, is so deep that the rear portion could not be taken in that way. A lot running 300 feet deep would not be a fair criterion to go by.

Mr. READ: What is the best uses for which this strip of land off the east end of the block is capable, used in connection with the remainder of block 9, owned by Mr. Snodgrass?

A. Any industrial purpose; factories, warehouses, or elevators or foundries, or any such purpose.

Q. What use did you consider when you put this valuation on it?

A. The best uses that it could be put to.

Q. What use?

A. Either of those uses; it is immaterial; such as a man might want to use it for.

Q. Do you consider it is worth as much for manufacturing purposes as for elevator?

A. Yes, sir.

Q. And you consider it is as valuable for a coal yard as for manufacturing purposes?

A. Possibly; just whichever use the owner or prospective purchaser might care to use it for.

Q. Do you consider the entire area of block 5 of the value of 40 cents a square foot?

A. I do; yes, sir.

58 Q. Do you consider the entire area of block 9, owned by Mr. Snodgrass, of the value of 40 cents a square foot?

A. Virtually that. There is a slight difference in depth in the lots.

Q. What occasions the difference in the value of the two tracts of land?

A. I do not know as taking the two tracts there would be a material difference. I think in five it is worth a little the most.

Q. Why?

A. It runs to the tracks east of it having direct connection with the other lines of railroad.

Q. Are you aware the ownership of it is divided, and one man owns the east part and another the west?

A. I am not positive now.

Q. If that was the case, if it were divided about equally, would the west portion of that be any more valuable than the entire Snodgrass tract?

A. I do not know that it would; no.

Q. As a matter of fact, there is no substantial difference in the valuation between block 9 and 5, is there?

A. I don't think there is; no.

Q. Then, if we were to put a valuation of 40 cents a square foot on the tract taken from block 9, it would be a fair valuation, would it not?

A. Well, there is one reason why this part taken is not quite as valuable.

Q. What is that?

59 A. It is virtually an inside lot, and it only has a frontage on a 33-foot street.

Q. Rockwell street terminates now right opposite it, doesn't it?

A. Yes, sir; but 19th street is a street—if you take off the rest of the street you wouldn't have as deep a lot.

Q. But it is used as a street?

A. Yes, sir.

Q. It is being improved?

A. There are certain improvements, water and sidewalk.

Q. Aren't they putting in a sewer?

Objected to.

A. I don't know. I haven't been there within a few days. There was no sewer there when I was there.

Q. Are you not aware an assessment has been levied for putting in a sewer?

A. I don't keep track of assessments. If I did I should have more that I could have to attend to.

Q. It has a full opening to the city, this little strip, by reason of Rockwell street?

A. Yes, sir.

Q. And it looks right down Rockwell street as it now stands?

A. It looks right down Rockwell street.

Cross-examination.

By Mr. HERRICK:

Q. Refferring to that part of the proposed street which is shown on the plat attached to the petition as lying between the line marked railroad fence on the north and the line marked
60 railroad fence on the south, between these lines extended, I understand you to testify that, in your opinion, the right to use that track for a public street, subject to the rights of the railway company to use it, is merely nominal in value, $1?

Objected to.

A. Yes, sir.

Mr. GILBERT: I object to that. That is not a fair statement of the witness's testimony.

Mr. HERRICK: I understood you to say yes to my question.

The COURT: He has answered the question. Put another one.

Mr. HERRICK: What do you understand the rights of the railroad company to be which you say the rights of the public is to be subject to?

A. Running and operating the same for such purposes for railroad traffic generally.

Q. You do not understand the railroad company would have any right to put any structure on this part of the tract, do you?

A. No, sir.

Q. It wouldn't be subject to any such right as that?

A. I wouldn't think it would.

Q. Such as a tank, coal shute, or any similar structure on this tract. You don't understand the right to be subject to that?

A. No, sir.

61 Q. Or any structure which would interfere with the free and uninterrupted use of this 80-foot strip for a public street. You don't understand it is subject to that?

A. The street is only 66 feet.

Q. I mean 66 feet. I will ask it differently. You do not understand it would be subject to the right in the railroad company to put upon this 66-foot strip any structure whatever or to make any use of it whatever which would interfere with the free and uninterrupted use by the public for a public street?

A. No, sir; I do not.

Q. You say the right to use this street is merely nominal in value. Is the right you contemplate a right in perpetuity?

Objected to by counsel for petitioner. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. I suppose it is.

Q. So, in your opinion, if I understand you, the right to the public to use in perpetuity a strip of land about 138 feet long and 66 feet wide for a public street would be merely nominal in value. Is that correct?

Objected to by counsel for petitioner.

A. No, sir.

Q. What is your conclusion?

A. Subject to the rights of the railroad company, they having the right of way, as it were a paramount right.

Q. That is the only qualification you make?

A. I think so now.

62 Q. How did you get at the value? Is there any market value for it?

A. None at all.

Q. There is no market for public streets, is there?

A. There is no market for land covered by railroad tracks subject to the railroad rights in such sizes.

Q. Do you know of any market for public streets anywhere?

Objected to be counsel for petitioner as immaterial.

The COURT: I think, on the same ground, for streets and railroads. Let us confine ourselves to what is on inquiry here. It is not a question of a market for streets.

Mr. HERRICK: It is obvious enough. What, in your opinion, would be the value of this land to the railroad company or to any one for use for railroad purposes at the date of the filing of the petition—would be or was?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. What was the fair market value at the date of filing the petition of this particular strip of land included within the proposed street for use or sale or any lawful purpose at the date of filing the petition?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. What would be the fair market value of this particular strip of property, subject to the right of the public to use it for a

63 public street?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. In your opinion is the value or will the value of that strip of land be depreciated by the opening of this public street across it?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. In your opinion will the value of the use of this particular strip of land be depreciated in any way by the opening of this public street across it or over it?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. Will the value of the use of this particular strip of land for railroad purposes be depreciated by the opening of this street across it?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. Is a joint perpetual right of user of a strip worth more than no right?

Objected to by counsel for petitioner. Objection sustained
64 by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Do you say that the right of the railroad company as owner of the property included in this strip to its exclusive use is worth no more than the mere right of joint user with the public?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. If I understand you, a similar crossing made anywhere or right of user anywhere over a similar railroad track would be of the same nominal value?

Objected to by counsel for petitioner. Objection sustained by the court; to which rulings of the court counsel for respondents then and there duly excepted.

A. Similar; yes, sir.

Q. Suppose the public should open a park a mile long extending over this railroad property and the question should be asked as to the value of the right of user by the public for this entire distance of that railroad property, subject to the right of the railroad company to operate tracks on it in the manner you have testified to, would you be of the opinion that that right would also be merely nominal in value?

Objected to by counsel for petitioner. Objection sustained by the court: to which ruling of the court counsel for respondent then and there duly excepted.

65 Q. Would the fact that this street is 66 feet wide instead of 80 feet, as streets are sometimes laid out, make any difference?

Objected to by counsel for petitioner. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Not at all.

Q. The right in either case would have the same nominal value?
A. Yes, sir.
Q. And the depreciation would be also the same, I understand you?

Objected to and question withdrawn.

Examination.

By Mr. MACK:

Q. You stated that the dimentions of this piece to be taken from block 5 were 10,795 square feet?
A. Yes, sir; those are my figures.
Q. Deducting a corner lot on the corner of 18th, 33 feet on 18th street, 141 feet deep, what would be the area of the balance of the property to be taken?

The COURT: I do not think we will stop to figure that out.
Mr. MACK: He has made the calculation.

A. 6,142.
Q. 6,142 square feet?
A. Yes, sir.
Mr. READ: Did you make this estimate of the value of the strip taken from the Snodgrass tract with or without the assumption that West 19th street was being improved along the entire south boundary of that block?
66 A. I took it as I found it at the time of this petition.
Q. And without reference to whether there was an assessment for a sewer or not?

Objected to by counsel for petitioner. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. I do not know whether there was a sewer or not. There was none there at the time.
Q. You did not include that in your estimate?
A. No, sir.
Mr. HERRICK: Would there be any decrease in the value of this particular tract belonging to the railroad company for railroad purposes by reason of the opening of this street?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Q. Would there be any decrease in value of this tract for railroad purpose- by reason of the uses which would be made by the public of this tract?

Objected to by counsel for petitioner. Objection sustained by the court; to which ruling of the court counsel for respondent then and there duly excepted.

Mr. Herrick, for respondent The Chicago, Burlington & Quincy Railroad Company, moved to exclude the testimony of this witness

as to this tract referred to as belonging to the Chicago, Burlington & Quincy Railroad Company.

67 Motion overruled; to which ruling of the court counsel for respondent The Chicago, Burlington & Quincy Railroad Company then and there duly excepted.

WILLIAM T. CUSHING, called as a witness on behalf of the petitioner, being duly sworn, was examined in chief by Mr. Thorn and testified as follows:

Q. What is your name?
A. William T. Cushing.
Q. What is your business?
A. Real estate.
Q. How long have you been in the real-estate business?
A. About 21 years.
Q. Where do you reside?
A. Chicago.
Q. Whereabouts in Chicago?
A. On the West Side.
Q. Are you acquainted with the property in the neighborhood of Rockwell and 18th streets?
A. I am.
Q. Have you had any transactions in that neighborhood?
A. Yes, sir.
Q. Recently?
A. I have not consummated any sales in the immediate neighborhood recently.
Q. What was it?
A. Negotiations.
Q. Negotiations for what?
A. Looking toward a sale.
Q. Of property similar in character and similarly situated to this?
A. Yes, sir.
Q. I will ask you, Mr. Cushing, what was the fair cash market value, on November 12th, 1890, of the west 33 feet of block 5,

68 in Walker's Douglas Park addition to Chicago.
A. $3,347.

Q. Do you consider that more valuable as a separate piece of property, standing alone, or as a part of the whole block 5?
A. As a part of the whole of block 5.
Q. Have you given your opinion on that basis?
A. Yes, sir.
Q. What, in your opinion, was the value on the same day of the west 33 feet of block 8, Walker's Douglas Park addition to Chicago?
A. I wish to qualify my answer to that. It is according to where the north line of block 8 is.
Q. The north line of block 8 is the south line of that railroad fence?

The COURT: The curved fence?

Mr. THORN: The curved fence. On our plat it is curved.

A. $1,116.

Q. Do you consider that more valuable as a separate piece of property or part of the whole tract?

A. Part of the whole tract.

Q. What, in your opinion, was the value on the same day of the south 138.7 feet of the east 33 feet of block 9?

A. $1,120.

Q. Have you considered that as part of the whole tract?

A. I did.

Q. You considered it more valuable on that basis?

A. I considered it more valuable on that basis.

69 Cross-examination.

By Mr. READ:

Q. Have you any property for sale out here?

A. Yes, sir, and no, both. I am negotiating for a piece and have been.

Q. Do you own any property?

A. Not in the immediate vicinity.

Q. How far away is the property you own?

A. Nearly a mile.

Q. Where is it?

A. Near the corner of Robey street.

Q. What direction?

A. Nor*ht*.

Q. Is it near a railroad?

A. No, sir.

Q. Does it front on a railroad?

A. No, sir.

Q. Can it be reached by a railroad, by a switch?

A. No, sir; resident property.

Q. When did you sell property in this vicinity?

A. It is according to what you call the vicinity. Within two or three blocks it has been a good while.

Q. How long?

A. I should judge ten years, that I can recall now.

Q. On what do you base your estimate?

A. On what value do you mean?

Q. On what do you base your opinion as to the value of the east 33 feet of the 138.7 feet of block 9?

70 A. I base my opinion on the price, among other things, that property is offered at by comparison, by my knowledge of real estate, and based, among other things, on the values of property that I have been negotiating for in that immediate neighborhood within three months.

Q. What kind of property is this you have been negotiating for?

A. Manufacturing property having a switch connection.

Q. Where?

A. Right just northeast of this on the Belt line.
Q. On the Belt line?
A. On those tracks that run down there.
Q. How far is the Belt line from this place?
A. A very short distance.
Q. What Belt line do you refer to?
A. I mean the Northwestern and Burlington and Pan Handle, running north and South on Rockwell.
Q. They are one block east of Rockwell that you speak of?
A. Yes, sir.
The COURT: That is what we call the Pan Handle road?
A. Yes, sir; it is one of them.
Mr. READ: Not the Western Indiana Belt line; that is four or five miles away.
A. The Pan Handle, Northwestern, and all those roads.
Q. Have you bought or sold any property out there?
A. I have not, in this immediate vicinity.
Q. You have simply been negotiating?
71 A. Yes, sir; I know the values. I know what they ask for them.
Q. Do you know of any actual sales in this immediate vicinity?
A. Yes, sir; but I can't recall the price.
Q. Then your opinion is not based on the actual sales?
A. It was; yes, sir; let me qualify that by saying not wholly. There has been a difference as to the value of property in that immediate vicinity two years ago, about the time of filing this petition, and the present time—a very marked difference.
Q. About two years ago were you negotiating for any property?
A. No, sir.
Q. On November 12th, 1890, or within three months of that date, were you negotiating the sale of any property there?
A. I did not.
Q. Do you know the price paid by anybody on this property out there at that time?
A. Yes, sir.
Q. How did you come to know that?
A. In the line of my business.
Q. Did you have any property for sale then?
A. I don't recollect.
Q. Were you trying to buy any property out there for anybody at that time?
A. In that vicinity?
Q. Yes, sir.
A. About that time, yes, sir; I am giving you the benefit of values at the present or within the last year.
Q. What is the best use of the Snodgrass property, block 9, except the part belonging to the railroad company?
72 A. Industrial purposes.
Q. Have you considered its use for elevator purposes?
A. I have; but it cuts no figure as to the value of property.
Q. Is it not particularly adapted for a grain elevator?

A. It may be.

Q. It is not adapted for subdivision and sale for homes the way it is situated?

A. The property right opposite is used for that purpose, but I should judge this is more valuable used for other purposes.

Q. It is adapted for manufacturing or an elevator or a coal yard?

A. Any purpose any one sees fit to use it for. The values are there.

Q. What did you put your valuation of $1,120 on the 33-foot strip of block 9 on? How did you figure it, frontage or area?

A. I figured the area.

Q. How much a square foot?

A. 25 cents.

Mr. MACK: Considering the north 141 feet of the west 33 feet of block 5—that is, the north 141 feet of that part of block 5 which is sought to be taken in this suit—as a seperate piece of property, the block fronting 33 feet on 18th street, having a depth of 125 feet on Rockwell street and 16-foot alley back of it, what is the best purpose to which that lot could be put?

A. Subdivision purposes—that is, to other uses than manufacturing.

Q. I am simply asking you — that one block.

73 A. Any other purpose?

Q. What is the best purpose to which it could be put, considering it is on the corner of 18th and Rockwell street-?

A. I agree with Mr. Wilson; a saloon would be about the best.

Q. A saloon?

A. Yes, sir.

Q. What would you consider the value of that corner per front foot, on 18th street, used for a saloon?

A. At $50 a front foot, fronting on 18th street.

Q. You think that is the highest value for the best purpose to which you could put it?

A. For that particular lot that you describe.

Mr. READ: Where is that property you are negotiating for?

A. It fronts on Western avenue and runs back to those tracks and north of 16th street.

Q. Of 16th street?

A. Y*se*, sir.

Q. What railroad has it connection with?

A. I do not know myself definitely. I think there are ten or twelve tracks there.

Q. Who owns them?

A. I believe the Pan Handle and North Western and Burlington & Quincy. I understand from the owner of the property that all the roads coming into the city have swit*h*cing rights there.

Q. The Burlington?

A. Has switching connections of superior——

Q. How large an area is it?

74 A. A little less than five acres.

Q. How far are you from this place, then?

A. Two or three blocks.
Q. Two or three blocks?
A. I should judge so; 16th and Western avenue. The frontage on Western avenue is paved, with all improvements, and running back and having superior switching facilities on that railroad.
Q. What is the price put on that?
A. About $15,000 per acre.
Q. And it has connections with Western roads?
A. Yes, sir.
Q. And Eastern roads?
A. Yes, sir.
Q. And is three blocks away?
A. Yes, sir; on a paved street, a section line, and no railroads to pass in cartage to and from the city.

The petitioner here rested.
Recess to 2 o'clock p. m.

75 Respondents offer in evidence the plat referred to in the testimony of the witness Bremner, being Exhibit A, which was admitted in evidence and is as follows:

(Here insert plat, Exhibit A.)
(Here follows map marked p. 75½.)

76 M. B. WALKER, having been first duly sworn on behalf of the respondent The Chicago, Burlington & Quincy Railroad Company, was examined in chief by Mr. Herrick and testified as follows:

Q. What is your occupation?
A. I have charge of the real-estate department of the Chicago, Burlington & Quincy railroad.
Q. How long have you been connected with that company in that capacity?
A. Twelve years.
Q. Have you charge of the deeds and title papers of the company?
A. I have the custody of those papers; yes, sir.
Q. In connection with that department of the business, have you had to do more or less with the purchase of real estate for the railroad company?
A. More or less; yes, sir.
Q. For right of way and for other purposes?
A. Yes, sir.
Q. Has that involved a knowledge, more or less, of values in connection with those properties?
A. I think so.
Q. I call your attention to the plat which has just been offered in evidence, showing the proposed street, Rockwell street, and the adjoining land. On this plat is a tract marked tract A. Have you

the deed by which the Chicago, Burlington & Quincy Railroad Company acquired its title to that tract?

A. I have, sir.

77 Q. Will you produce it?

A. (Witness does so.)

Counsel for respondent The Chicago, Burlington & Quincy Railroad Company offered in evidence the deed referred to by the witness, being dated June 24th, 1866, from George A. Robbins and others, as executors, to the Chicago, Burlington & Quincy Railroad Company.

Objected to be counsel for petitioner as incompetent and immaterial. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Q. Have you the deed to the tract marked on this plat tract D?

A. Yes, sir (producing same).

Counsel for respondent offered in evidence the deed referred to by the witness, being dated November 8th, 1862, from Davis S. Burnett and wife to the Chicago, Burlington & Quincy Railroad Company, conveying the tract marked on the plat tract D.

Objected to be counsel for petitioner as incompetent and immaterial. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Q. Have you the deed conveying the tract marked tract E?

A. I have (producing same).

Counsel for respondent offered in evidence the deed produced by the witness, the same being dated September 22nd, 1862, from

78 Allen Robbins to the Chicago, Burlington & Quincy Railroad Company, conveying the tract marked on the plat E.

Objected to be counsel for petitioner as incompetent and immaterial. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Q. Have you the deed conveying the tract marked tract C?

A. Yes, sir (producing same).

Counsel for respondents offered in evidence the deed produced by the witness, the same being dated May 12th, 1884, from Mary G. Burnett and William A. Goodman to the Chicago, Burlington & Quincy Railroad Company, conveying the tract marked on the plat tract C.

Objected to be counsel for petitioner as incompetent and immaterial. Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Said deeds so introduced by counsel for respondent The Chicago, Burlington & Quincy Railroad Company are as follows:

79 This indenture, made and entered into this twenty-first day of June, A. D. 1866 by and between George A. Robbins, Samuel Howland Robbins and Francis Bacon, as executors of the late George S. Robbins deceased and Francis Caroline Robbins,

widow of said George S. Robbins, all of the city, county, and State of New York, parties of the first part; and The Chicago, Burlington & Quincy Railroad Company, party of the second part. Witnesseth:

That whereas, the said George S. Robbins, deceased, did in his lifetime, make execute and publish his last will and testament, bearing date the 11th day of November A. D. 1865 wherein, and whereby he, the said George S. Robbins, deceased, did appoint the said George A. and Samuel Howland Robbins, and the said Francis Bacon to be the executors of the said last will and testament; and

Whereas, he the said George S. Robbins, deceased did in his lifetime, also make, execute and publish a certain codicil to his said last will and testament, bearing date the 19th day of December, A. D. 1865, republishing and reaffirming the same, among other things; and

Whereas, he, the said George S. Robbins, deceased, did in his lifetime, also make, execute and publish a certain second codicil to his said last will and testament, bearing date the 20th day of December, A. D. 1865, wherein, and whereby among other things he did authorize and empower the said executors (named in the said will,) to sell all or any part of his real estate, while the
80 same should remain undivided amongst his heirs, at public or private sale, and upon such terms as to prices, credit, and security as the said executors should think advantageous; and did also authorize them the said executors, in the execution of the said powers, to execute and deliver all necessary deeds, conveyances, leases, covenants, contracts and agreements, whether under seal or otherwise, which were to be binding upon all persons interested in his said estate; and did further appoint that the powers given in and by the said second codicil, should be exercised by such of the said executors as should qualify and by the survivor or survivors of them; and

Whereas, the said George S. Robbins departed this life in the city of New York on the 15th day of January A. D. 1866, and the said last will and testament (together with the two codicils thereunto, above mentioned) of him the said George S. Robbins, deceased, was afterwards on the 18th day of April, A. D. 1866 presented and proven and admitted to probate, and duly recorded in the proper office, and under proper authority in the said State of New York, in the county of New York aforesaid, and letters testamentary were thereupon issued to the said George A. Robbins, Samuel Howland Robbins and Francis Bacon in pursuance of the laws of the State of New York, and they, the said George A. Robbins, Samuel Howland Robbins, and the said Francis Bacon, thereupon became, and now are qualified to act as the executors of the said last will and testament, and the said codicils thereunto, pursuant to the powers given in and by the said last will and testament, and the
81 said two codicils thereunto, of him the said George S. Robbins deceased, and

Whereas, exemplified copies of the said last will and testament and the said two codicils thereunto, duly certified according

to law together with an exemplified copy of the record of proceedings had, touching the same in the proper court of the State of New York, have been duly recorded in the recorder's office for the record of deeds, in the county of Cook, and State of Illinois, in Book 343 of Deeds, at page 159; and

Whereas, the real estate whereof the said George S. Robbins, died seized, as yet remains undivided amongst his heirs, and the said executors have sold the premises hereinafter mentioned at and for the consideration hereinafter expresses, and have agreed to convey the same to the said party of the second part; and

Whereas, the said Francis Caroline Robbins hath agreed to release to said party of the second part, all her interest and claim of dower in and to said premises.

Now therefore, in consideration of the premises and of the sum of thirty-three hundred and four (3,304) dollars to us in hand paid the receipt whereof is hereby acknowledged, we, the said George A. Robbins, Samuel Howland Robbins, and Francis Bacon, as such executors, in execution of the power and authority vested in us, as aforesaid, and the said Francis Caroline Robbins, do by these presents, grant, sell, convey and release, unto the said party of the second part, its successors, and assigns forever, the following-described
82 tract, piece or parcel of land, situate, lying and being in the county of Cook, and State of Illinois, to wit: A part of the east half of the southeast quarter of section twenty-four (24), township thirty-nine (39) north, range thirteen (13) east of third principal meridian, bounded and described as follows,

Commencing at the point of intersection of the west line of the right of way of the Chicago and Great Eastern railway, with the south line of the right of way of the Chicago, Burlington and Quincy railroad thence running westerly along said south line of right of way of the Chicago, Burlington and Quincy railroad six hundred fifty-four (654) feet to the half-quarter section line—thence south on said half-quarter section line seventy-eight and a half (78½) feet to a point thirty (30) feet distant at right angles from the center line of the track connecting the Chicago, Burlington and Quincy and the Chicago and Great Eastern railroads—thence southeasterly along and thirty (30) feet distant from the center line of said track connecting said Chicago, Burlington and Quincy and Chicago and Great Eastern railroads with a curve of eight hundred (800) feet radius, to a point on the west line of the right of way of said Chicago and Great Eastern railway ten hundred fifteen (1,015) feet south of the south line of the right of way of the Chicago, Burlington and Quincy railroad, thence northerly on said west line of right of way of the Chicago and Great Eastern railway ten hundred fifteen (1,015) feet to the place of beginning. Containing four and seventy-two hundredths (4.72) acres. (Subject to all taxes and assess-
83 ments) together with all claim or dower right of the said Francis Caroline Robbins therein or thereto.

To have and to hold, the said premises and all the estate, right, title, interest, and claim whatever, which the said parties of the first part or either of them, either in law or equity, can convey to the

only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

In testimony whereof, the said parties of the first part hereunto set their hands and seals the day and year first above written.

(S'd) GEORGE A. ROBBINS, *Executor,*
(S'd) SAMUEL HOWLAND ROBBINS, *Ex.,*
(S'd) FRANCIS BACON, *Ex.,*
As Executors to George S. Robbins, Deceased.
(S'd) FRANCIS CAROLINE ROBBINS.

Signed, sealed, and delivered in the presence of—
D. RANDALL,
As to G. A. Robbins and Francis Bacon, Ex'ors.
MICHAEL BERWIN,
As to Mrs. Robbins & S. Howland Robbins, Executors.
WM. T. FANHAM,
As to all the Parties.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

I, William T. Famham, a notary public in and for said city, in the county aforesaid, do hereby certify that George A. Robbins, Samuel Howland Robbins, Francis Bacon, and Francis Caroline Robbins, who are each of them personally known to me to be the same persons mentioned in and who subscribed the fore-
84 going deed, appeared before me in person and severally acknowledged that they and each of them signed, sealed, executed, and delivered the said deed as their *ferr* and voluntary act for the uses and purposes therein set forth.

Given under my hand and notorial seal, at the city of New York aforesaid, this twenty-eight- day of June, A. D. 1866.

(S'd) WILLIAM T. FAMHAM,
Notary Public, State, City, & County of New York.

Copy.

Executors of Geo. A. Robbins to release C., B. & Q railroad.

Recorded Aug. 27th. 1866, Book 358, page 263.
WM. L. CHURCH, *Clerk.*

Refiled for record Aug. 26th, 1872, Book 149, page 303.
N. J. FASSETTS, *Recorder.*

85 This indenture, made the eight- day of November in the year of our Lord one thousand eight hundred and sixty-two between Davis S. Burnet and Mary G. Burnet, his wife, of Cincinnati, O. of the first part and the Chicago, Burlington & Quincy Company, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of two hundred and fifty-two ($252.00) dollars to them in

hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, aliened and confirmed, and by these presents do grant, bargain sell remise, release alien and confirm, unto the said party of the second part, and to their successors and assigns forever, all that certain piece or parcel of land, situated, lying and being in the county of Cook and State of Illinois and known and described as follows: to wit: A strip of land eighty (80) feet in width through the east half of the west half, of the southeast quarter of section twenty-four (24) in township thirty-nine (39) north thirteen (13) east of the third (3d) principal meridian; being thirty-three (33) feet in width on the south side, and fourth-seven (47) feet in on the north side of the center line of the south track of the Chicago branch of the Chicago, Burlington & Quincy railroad, as now located and staked out through said tract of land, and containing one and twenty-six hundredths (1.26) acres be the same more or less. The portion herein conveyed, being more clearly indi-
86 cated by the colored portion of the plat on the back of this deed.

Together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right title, interest, claim and demand whatsoever, of the said parties of the first part, either in law or equity, of, in and to the above-bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, and to their successors and assigns forever. And the said parties of the first part, for their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, their successors and assigns, that at the time of the ensealing and delivery of these presents, they were well seized of the premises above conveyed, as of good, sure, absolute and indefeasible estate of inheritance of the law, in fee-simple, and that the said lands and premises are free from all incumbrances whatever; and that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, their successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hand and seal the day and year first above written.

87 (S'd) D. A. BURNET. [SEAL.]
(S'd) MARY G. BURNET. [SEAL.]

Signed, sealed, and delivered in presence of—

(S'd) ROBERT A. JOHNSON.
(S'd) J. BURNET.

[50 cents. United States inter. revenue. 50 cents.]

STATE OF OHIO, } ss:
Hamilton County, }

I, Robert A. Johnson, a notary public in and for said county, in the State aforesaid, do hereby certify that David A. Burnet and Mary G. Burnet, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all right, title, and interest in and to the premises described in said deed, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called.

And the said Mary G. Burnet, wife of the said David A. Burnet, having been by me examined separate and apart and out of the hearing of her husband and the contents and meaning of the said instrument of writing having been by me made known and
88 explained to her, acknowledged that she had freely and voluntar-y executed the same and relinquished her dower in the lands and tenements therein mentioned without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notorial seal this 8th day of November, A. D. 1862.

—— ——.

Warranty Deed.

D. G. Burnett & wife to Chicago, Burlington & Quincy R. R. Comp'y.

STATE OF ILLINOIS, } ss:
Cook County, }

67192.

This indenture was filed for record on the 30 day of May, A. D. 1863, at the hour of — o'clock and — m. — m., and duly recorded in Book 254, page 415.

WM. L. CHURCH, *Recorder.*
——, *Clerk.*

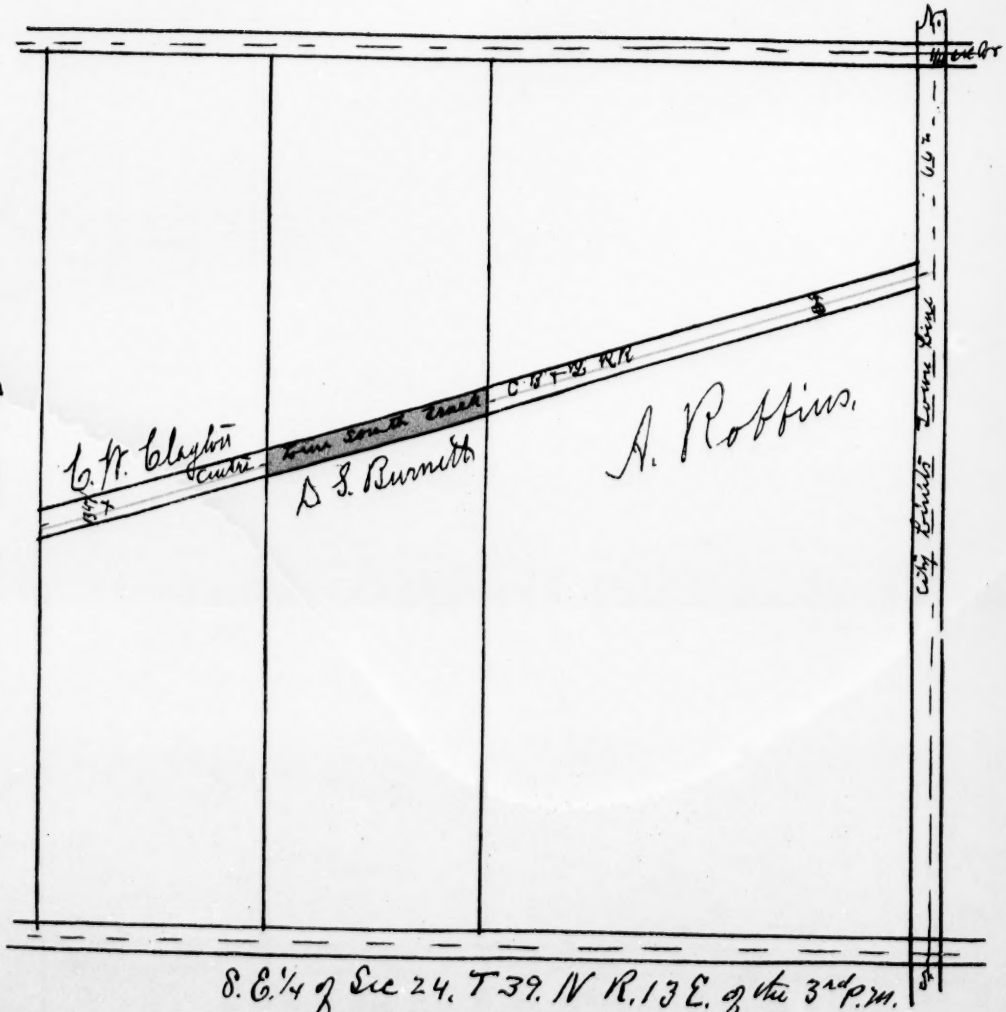
#52189.

Refiled for record Aug. 26, 1892, Book 117, page 85.
N. J. FASSETT, *Recorder.*

(Here follows map marked p. 89.)

90 This indenture, made the twenty-second day of September in the year of our Lord one thousand eight hundred and sixty-two, between Allen Robbins, of the city of Chicago, county of Cook, State of Illinois, of the first part, and the Chicago, Burlington & Quincy Railroad Company, of the second part, witnesseth:

That the said party of the first part, for and in consideration of


No. 402.
C.B.&Q. R.R. Co.
Chicago.
C. W. Clayton
Center line south track
C. B. & Q. R.R.
D. S. Burnett
A. Robbins.
City Limits Town Line
S. E. 1/4 of Sec 24. T 39. N R. 13 E. of the 3rd P.M.

the sum of four hundred and ninety-six ($496.00) dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release, alien and confirm, unto the said party of the second part, and to their successors and assigns forever, all that certain piece or parcel of land, situated, lying and being in the county of Cook and State of Illinois, and known and described as follows, to wit: A strip of land eighty (80) feet in width through the east half of the southeast quarter of section twenty-four (24) in township thirty-nine (39) north range thirteen (13) east of the third principal meridian; being thirty-three (33) feet in width on the south side and forty-seven (47) feet in width on the north side of the center line of the Chicago branch of the Chicago, Burlington & Quincy railroad as now located and staked out through said tract, and containing two and forty-eight hundredths (2.48) acres be the same more or less. Reference being made to the plat on the back of this deed for a more perfect description.

91 Together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above-bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, and to their successors and assigns forever. And the said party of the first part, for his heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, their successors and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the premises above conveyed, as of good, sure, absolute and indefeasible estate of inheritance in the law, in fee-simple, and that the said lands and premises are free from all incumbrances whatever; and that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, their successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, he will forever warrant and defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(S'd) ALLEN ROBBINS. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

(Stamp, 50 cts.)

92 STATE OF ILLINOIS, } ss:
Cook County, }

I, H. H. Hamlin, a notary public in and for said county, in the State aforesaid, do hereby certify that Allen Robbins, who is personally known to me to be the same person whose names is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 22d day of Sept., A. D. 1862.

—— ——.

Warranty Deed.

Allen Robbins to Chicago, Burlington & Quincy R. R. Company.

STATE OF ILLINOIS, } ss:
Cook County, }

67194.

This instrument was filed for record on the 30 day of May, A. D. 1863, at the hour of — o'clock and — m. — m., and duly recorded in Book 254, page 417.

WM. L. CHURCH, *Recorder.*
——— ——, *Cl'k.*

52190 X.

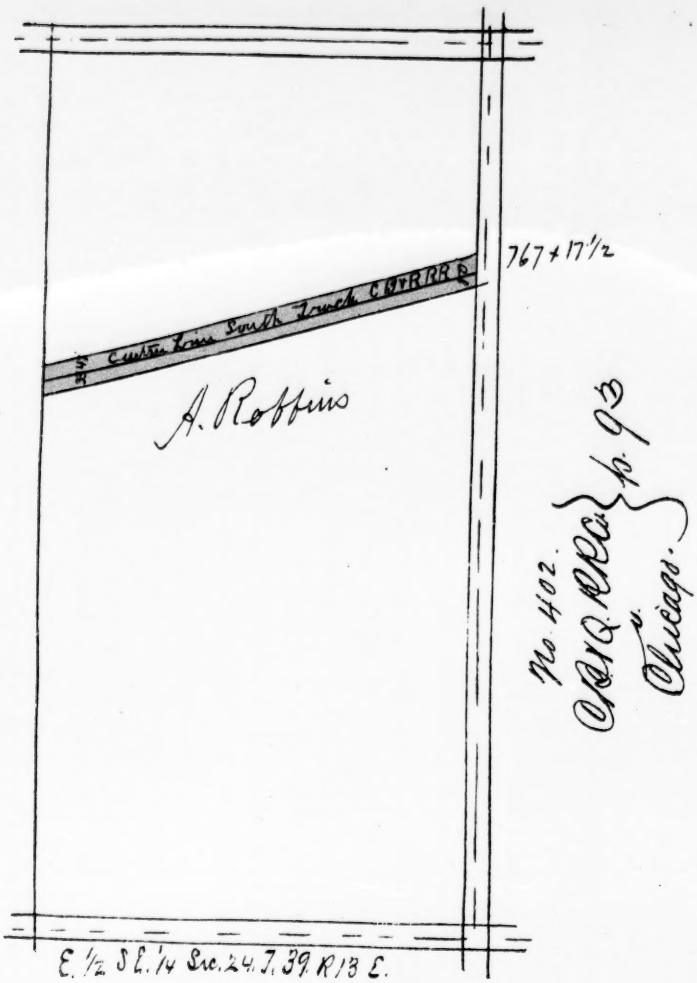
Refiled for record Aug. 26th, 1872, Book 117, page 87.
N. J. FASSETTS, *Recorder.*

(Here follows map marked p. 93.)

94 This indenture, made this 12th day of May in the year of our Lord one thousand eight hundred and eighty-four between Mary G. Burnet, and William A. Goodman, of the city of Cincinnati, in the county of Hamilton and State of Ohio, party of the first part, and The Chicago, Burlington and Quincy Railroad Company, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of six hundred (600) dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has, and by these presents doth remise, release, alien and convey unto the said party of the second part, and to its successors, heirs and assigns forever, all the following-described lot, piece or parcel of land, situated in the county of Cook, and State of Illinois, and known and described as follows, to wit:

That part of block nine (9) in Walker's Douglas Park addition, being a subdivision of the east half of the southeast quarter (E. ½ S. E. ¼) and the east half of the west half of said southeast quarter (E. ½ of W. ½ of S. E. ¼) of section twenty-fo-re (24) t'p 39, R. 13 east


767+17½
C. & S. C. & St. L. & C. St. R.R. Co.
A. Robbins
No. 402.
C. B. & Q. R.R. Co.
Chicago.
No. 93
E. ½ S.E. ¼ Sec. 24 T. 39 R. 13 E.

50

92

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of 3rd P. M. Commencing on the east line of block none (9) at the south line of the Chicago Burlington and Quincy railroad right of way, thence south seventy-eight and one-half (78½) feet, thence due west to the right of way of the Chicago, Burlington and Quincy railroad, thence northeasterly along said right of way to place
95 of beginning. Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and all the estate, right title interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above-described premises, with the hereditaments and appurtenances.

To have and to hold the said premises above described, with the appurtenances, unto the said party of the second part, its successors, heirs and assigns, forever.

And the said Mary G. Burnet and William A. Goodman party of the first part, for themselves, their heirs, executors and administrators, do covenant, promise and agree, to and with the said party of the second part, its successors, heirs and assigns that they have not done, or suffered to be done, anything whereby the said premises hereby granted are or may be, in any manner encumbered or charged; and that the said premises, against all persons lawfully claiming, or to claim the same, by, through or under them will warrant and forever defend. Subject to all taxes and special assessments subsequent to 1883.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege and advantage, and exemption, under and by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale on execution or otherwise.

In witness whereof? the said party of the first part have
96 hereunto set their hands and seals, the day and year first above written.

(S'd) W. A. GOODMAN. [SEAL.]
(S'd) MARY G. BURNET. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

STATE OF OHIO, } ss:
County of Hamilton, }

I, William B. Burnet, a notary public in and for the said county, in the State aforesaid, do hereby certify that Mary G. Burnet and William A. Goodman, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this fifteenth day of May, A. D. 1884.

(S'd) WM. B. BURNET,
Notary Public.

Mary G. Burnet and W. A. Goodman to C., B. & Q. R. R. Co.

Recorded Aug. 23d, 1884, Book 1408, page 509.

(S'd) JOS. W. BROCKWAY.

97 Mr. HERRICK: Do you require me to make any further proof of title?

Mr. GILBERT: No.

Mr. HERRICK: The Burlington Company has, to your knowledge, held possession and title under those deeds?

A. Yes, sir.

Q. Paying all the taxes since your connection with the company?

A. Yes, sir.

Q. On the properties described in these deeds?

A. Yes; excepting as to tract C, which is since 1883.

Q. Since the date of the deed?

A. No; prior to the date of the deed.

Cross-examination waived.

F. A. DELANO, having been first duly sworn on behalf of the respondents, was examined in chief by Mr. Herrick and testified as follows:

Q. Mr. Delano, what is your full name and occupation?

A. F. A. Delano; superintendent of freight terminals, C., B. & Q. railroad, Chicago.

Q. How long have you been engaged in the railroad business?

A. Nearly seven years.

Q. What do your duties as superintendent of railroad terminals involve?

A. I have charge of all of the tracks of the company east of Clyde, in Cook county, and charge of the operating of those tracks
98 and freight-houses.

Q. You have occasion to have a general familiarity with the operation of the road over those tracks?

A. I have.

Q. And do you also, in that position, have charge of the company's property within the city of Chicago?

A. I have.

Q. The railroad tracks and other terminal facilities?

A. I have.

Q. You are familiar, I suppose, with the property belonging to the C., B. & Q. Railroad Company which it is proposed to occupy with the proposed crossing by Rockwell street?

A. I am familiar with it.

Q. Please look at the plat of the property in evidence and refer-

ring first to that part of the property covered by the proposed crossing in tracts D and E, and state how many tracks there are located on that property at the point of the crossing.

A. In tracts D and E there are five main tracks and one sideing.

Q. What are those main tracks used for?

A. Two are used for passenger trains and three are used for freights.

Q. How far is this crossing from the passenger depot of the company?

A. Just four miles.

Q. How far is it from the nearest freight yard?

A. A thousand feet.

99 Q. Is that all within the city of Chicago?

A. This is three miles inside of the city limits.

Q. Those tracks that are shown there—are they as they were at the date of the filing of the petition?

A. When was the petition filed?

Q. November, 1890.

A. I think there is one track on the south that was not there at that time.

Q. What is that used for?

A. That is used for freight trains.

Q. One of the main freight tracks?

A. One of the main freight tracks, and was not there at that time. All the other tracks were.

Q. One of those tracks, you say, is a side track. What is that used for?

A. That is used to reach the Chicago Foundry Supply Company and the Metzger Linseed Oil Company.

Q. I am referring and you are to the side tracks on D and E?

A. Yes, sir.

Q. I see on this plat are tracks connected with it marked in green. Do those belong to the Burlington Company?

A. No; they are not on its property.

Q. Calling your attention to tract A, what tracks are there on that tract?

A. There are two. One is the main Y connecting with

100 the Pan Handle and the Chicago, Milwaukee & St. Paul roads. The other is a switch leading off of it.

Q. The tracks of the Pan Handle and Milwaukee & St. Paul roads you refer to that this Y connects with is the track immediately east of tract A?

A. Yes, sir.

Q. What is the other track on tract A used for?

A. That other tract was put in for an industry that had a location there.

Q. Where is that industry located—on tract A?

A. It is located on tract A, about 150 feet east of the proposed street.

Q. What is that industry; what is the business of it and nature of it?

A. That was occupied until the first of this May by a scrap dealer.

Q. Under a lease from the Burlington Company?

A. Yes, sir.

Q. And this side track was put in to furnish a connection to that industry?

A. To that industry.

Q. What is that side track used for now, or since that industry ceased to be operated?

A. Well, we have used that for storage purposes. That is all we have used it for since that time.

Q. What do you mean by storage purposes?

A. Holding cars on that we have not immediate disposition for.

Q. To run a train of cars to stand on the track out of the way. Is that it?

A. Yes.

101 Q. How long do those cars stand at times on that track?

A. I should say on an average about two days at a time—the same cars.

Q. They stand in empty trains?

A. Yes, sir.

Q. How long? How -any cars at a time are placed on the track?

A. We use this (indicating) also as a standing track.

Q. Yes; but how many cars at a time on this side track do you mean?

A. That track holds about ten cars.

Q. You fill it up, in other words?

A. We fill it up; oh, yes.

Q. Do you also use this Y track for the storage of cars?

A. During the day we do.

Q. They stand how long at a time?

A. Well, from morning until evening, very frequently.

Q. Fill that up (indicating) sometimes with cars for storage?

A. Very frequently. The way we handle business we have cars there all the time.

Q. You say there is a side track on tracts D and E. Is that sometimes used for the storage of cars?

A. Not often. Those tracks are usually used for running tracks, and when we are crowded for business we occasionally use one of the tracks for storage tracks.

Q. Allowing cars to stand in long trains for a length of time?

A. All day long.

Q. And these main tracks, are they used as a part of the main line of the railroad company for its entire freight and pas-

102 senger business?

A. Yes; as part of the main line.

Q. Now, treating this property within the limits of the proposed streets as property to be used exclusively for railroad purposes, state what structures might be put upon it.

Objected to by counsel for petitioners.

Mr. HERRICK: The question is merely preliminary.

Objection overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. We might put a——

Q. Used exclusively for railroad purposes, I mean?

A. We might put a coal chute for coaling engines, or a sand-house for giving engines sand, or water tank, or signal tower for operating switches and signals, or we might put signal-posts or switch-stands at that point.

Q. How about a track scale or office building?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. We might put track scales.

Q. Or an office building?

A. Or yard offices; yes, sir.

Q. Those structures would be entirely practicable and consistent with the use of the property as it is now for railroad purposes?

103 Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Entirely.

Q. Could they be put there if a street was opened to be used by the public across this property?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Certainly not.

Q. Is there room on that part of these tracts covered by the proposed street for additional tracks?

Objected to by counsel for petitioner as leading, incompetent, irrelevant, and immaterial; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. On the track outside of the right of way property, you mean?

Q. On all of this part included in this proposed street or any part of it?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. On tracts D and E is room for one more main track. On tract A there is room for four more main tracks.

104 Q. Could those additional tracks also be used for storage tracks?

Objected to by counsel for petitioner as leading; which objection

w-s overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. They could.

Q. Is there a possibility that this Y track and the switch-track connecting with it on tract A might be wholly discontinued?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. What occasion might lead to the entire discontinuance of that track?

Objected to by counsel for the petitioner; which objection was sustained by the court; to which ruling *ruling* of the court counsel for respondent- then and there duly excepted.

Q. How much of that tract A is now unoccupied?

A. The greater part of it.

Q. Is that tract A capable of developement for use for industries in the same way that you leased a portion of it?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

105 A. It is very well located for developement.

Q. For use for industries?

A. For use for industries or for railroad purposes.

Q. That is to say, would you connect these industries by side tracks to the tracks near by?

Objected to by counsel for petitioner as leading; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. I should connect it; *yse, eir.*

Q. Please state whether there is a possibility in the immediate future of the discontinuance of the tracks which you say are used for freight tracks over tracks D and E by reason of a possoble arrangement for the handling of freight destined to other roads by a system of belt lines outside of the city.

Objected to by counsel for petitioner as incompetent; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Is there a possibility that all the main tracks and also the side tracks on tracts D and E may be discontinued by reason of the adoption of joint terminals or a system of joint terminals by which different roads will enter over a system of tracks connecting at other points with the different roads in the city?

106 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for *p*espondents then and there duly excepted.

Q. Is it possible that in the near future such discontinuance of all the tracks may be made necessary by legislation requiring viaducts or the elevation of tracks, making it necessary for the economical and proper operation of the road to abandon its present main tracks and make use of a system of joint terminal tracks in a different location?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

A. Is there a possibility that the company may discontinue the use of the tracks at the crossing of the proposed street in tract A; and, if so, what might lead to this possible result?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. You will see that the two tracks on tract A are marked R and S. I will ask you whether they could be moved and operated further south so as to leave a larger space north of them.

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

107 A. There would be no difficulty in moving them so that it would be right on our boundary line.

Q. How much farther south would that move the Y track?

A. 23 feet.

Q. That would carry with it the switch-track, would it not?

A. Yes, sir.

Q. Are you familiar with the operation of the respondent's road and the extent and character of business done over it and over the tracks in use at the point of the proposed street crossing?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Yes; I am very familiar.

Q. What, in your opinion, will be the damage, if any, to the respondent railroad company by reason of the opening of the proposed street across its railroad on these three tracks, assuming that the land will continue to be used and may continue to be used for railroad tracks?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. What, in your opinion, will be the damage, if any, to the respondent railroad company by reason of the opening of the
108 proposed street across the tract A, and assuming that the tract will continue to be used for railroad tracks?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. Will there, in your opinion, be any depreciation in the market value by reason of the opening of the proposed street over the land of the respondent proposed to be crossed, assuming the land so crossed is to continue to be used for railroad tracks?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, would be the amount of that depreciation?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. Will there be, in your opinion, any depreciation in value for railroad purposes of the land of the respondent included within the proposed street by reason of the right to the public to use the tract for a street, assuming that the respondent's land will still continue to be used for railroad purposes?

109 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for the respondents then and there duly excepted.

Q. What, in your opinion, will be the damage, if any, to that part of the respondent's land proposed to be crossed by the proposed street and the land of the respondent adjoining and connecting therewith, or either of them, by reason of the opening of the street and the consequent right of the public to use the tract as a street?

Objected to be counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. What, in your opinion, is the marketable value for use for railroad purposes of that part of the tract A included within the proposed street without any street over it and free from any right of the public to use it for the purposes of a street?

Objected to be counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, will be the value of the land referred to in my last question for use for railroad purposes subject to the right of the public to use it as a street?

110 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, is the marketable value for use for railroad purposes of that part of the tracts D and E included within the proposed street, without any street over it, free from the right of the public to use it as a street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, would be the value of the land referred to in my last question for use for railroad purposes subject to the right of the public to use it for a street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Considering the value of the land for use for railroad purposes, to what extent, if any, will the value be depreciated by opening a street crossing over it, giving the public a right of way or right to use it?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

111 Q. What will be the effect of opening the proposed street on the use by the respondent company of its railroad and tracks across the proposed street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assuming the street to be opened across these tracks, what will it be necessary for the respondent company to do for the safe and proper operation of its railroad by reason of the opening of the street across it, and what expenditures on its part will be made necessary on that account?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Will it be necessary for the respondent company by reason of the opening of the proposed street, in order to the proper operation of its railroad, to construct gates and to employ men to operate the gates; and, if so, what will be the necessary expenditures on that account?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. If no gates should be erected, would it be necessary by
112 reason of the opening of the street, in order to the proper operation of the railroad, for the company to employ a flagman at the crossing of the proposed street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Would it be necessary, on account of the opening of the street and in order to the proper operation of the respondent's railroad, to plank across the crossing and fill in between the rails and put in an extra rail; and, if so, what would be the necessary expenditure on that account?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What is the nature of this locality as to its being populous or otherwise? Will there be a large amount of travel over the proposed crossing?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court the counsel for respondent then and there duly excepted.

Mr. HERRICK: I offer in this connection, if the court please, to prove by this witness that in case this street is opened it will
113 be necessary for the company, in order to the proper and safe operation of its railroad, to construct a set of gates and tower for operating the gates, plank the crossing, fill between the rails, and put in an extra rail at a total expense of $2,109, and to incur an annual expense of depreciation, maintenance, employment of gateman, etc., of $1,878. I offer to prove that each of those expenditures will be necessary.

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Examination by Mr. READ:

Q. Did you ever lease any portion of this tract A?
A. I did; yes, sir.
Q. For the Burlington road?
A. Yes, sir.
Q. Did you negotiate the lease?
A. I did.
Q. How long ago was it?
A. I think the lease was made in November, 1890.
Q. What was the valuation in that lease?

Objected to by counsel for petitioner on the ground that the lease is the best evidence.

Q. I mean in the leasing, what was the valuation put on it; the valuation of the portion of the tract leased?

114 Objected to by counsel for petitioner.

The Court: It don't make any difference how they got at it. It was so much a month or year, I suppose.

Mr. READ: What was the basis of that lease?

Objecter to by counsel for petitioner because the lease is the best evidence.

The COURT: If he knows how he got at it. Did you make the bargain yourself?

A. I did.

Mr. READ: How did you get at it?

A. I leased a piece of ground 80 by 100, and I took it at a valuation of 50 cents a square foot and let the men have it at six per cent. on that valuation.

Q. That was a portion of this tract A?

A. Yes, sir.

Counsel for petitioner moved to strike out the answer of the witness as incompetent and immaterial. Motion denied by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Q. I will ask you if you are familiar with the construction of switches or switch-tracks in relation to elevators and industrial properties along the line of the Burlington road in this city.

A. I am familiar with those.

Q. Are you familiar with the way block 9, south of that part of it that is owned by the Burlington road, lies and is situated?

A. I am.

Q. Suppose the east 33 feet of that block 9, south of the land owned by the C., B. & Q. road, were taken off of that tract
115 and Rockwell street were opened as proposed in this proceeding, what effect, if any, would it have as to the switching facilities or switching possibilities of the remaining tract of block 9? Would it in any way injure it?

A. It would shorten the standing room and shorten the tracks; yes, sir; as many as you put in.

Q. Would it in any way affect, and, if so, in what way, the access for switching purposes or track purposes from that part of block 9 which would be left to the Y from the Burlington to the Pan Handle track?

A. If the point of the switch was put on the west line of the street—of the proposed street—and you would not be able to reach a point where you could stand cars that is clear of the Y until you get about 200 feet west of there.

The COURT: Suppose it was put 33 feet east, at the middle of the street—at the middle of the proposed street—what difference is there? That is really the question. You say that the point of the switch here was at the west line of the street?

A. It would make 33 feet difference if there was no street at all.

Q. We are not talking about that. It is the distinction between making a point here and making a point there (indicating). What difference is there besides the 33 feet space? What is the difference?

A. It would make 33 feet difference on each track that you
116 put in.

Mr. READ: Now, if the street is opened as proposed in order to get a switch from this Y down to block 9 without crossing the street the stand will have to be placed at the west line?

A. West line of the street.

Q. Now, then, if the street were not opened you may state where a switch-stand could be placed.

The COURT: On your ground?

Mr. READ: No, sir; on the Burlington ground where it runs off from their Y. It has got to start off from their Y on their ground and they could put it in over here (indicating) if the street is not there, but, now the street is there, they can't put it there without a permit and it makes a tremendous difference. Not a difference of 35 feet, but probably a hundred feet.

The COURT: It would have to start at the west line anyway. The Burlington would not be bound to give you a switch connection anywhere east of that line, would they?

A. The point he wants to make is that there is a certain amount of dead track between such a point and the point where you could stand cars.

The COURT: I understand that; but the railroad is not bound to give you a switch except right adjoining their land.

Mr. READ: They are bound to give us a reasonable switch connection. What would be the effect on the switching facilities as to the remainder of block 9 by the opening of Rockwell street?
117 Would it benefit those switching facilities or injure them?

The COURT: It don't seem to me that that is a proper element of damages.

Mr. READ: What will be the effect of the proposed improvement—opening that street as it is proposed to be opened—upon the switching facilities as to block 9?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. If this street is opened as proposed and the east 33 feet of block 9 are taken from it as proposed would it be practicable to run a switch from this Y, without crossing the proposed street, to reach a manufacturing establishment located on the first 200 feet west of the supposed line of street in block 9?

Objected to by counsel for petitioner on the ground that the block is an entirety and the petitioner is condemning part of it, and the question does not refer to the block as a whole; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. I think not.

118 Examination by Mr. MACK:

Q. Mr. Delano, you are acquainted with railroad property and the adjoining property especially?

The COURT: Yes; he has answered that question.

Mr. MACK: You are acquainted with the switching arrangements of the Chicago Foundry Supply Company at this crossing of this railroad and Rockwell street?

A. I am.

Q. And the condition and size of their property there, are you not?

A. I am familiar with it.

Q. Assuming that the frontage of the Chicago Foundry Supply Company is 360 and $\frac{2}{10}$ feet on the railroad, what will be the effect as to the switching facilities of the company and as to the capacity to have cars stand on their switches after 34 and $\frac{8}{100}$ feet of the property fronting on the railroad is taken? What will the effect of the taking of that 34 and $\frac{8}{100}$ railroad frontage out of the 360 and $\frac{2}{10}$ railroad frontage be?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. The Chicago Foundry Supply Company now have two tracks on that frontage and those two tracks give them a capacity of ten cars on each track, and running the proposed street there would take just one car-length of room off each track.

119 Q. I will ask you further what will be the effect on the value of the remainder of that land for the purpose of the Chicago Foundry Company or for the purposes of a foundry supply company if this strip is taken from the present piece of property.

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What will be the effect upon the market value, if you know?

Objected to by counsel for petitioner; which objection was overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

Q. That is, for the purpose of the company that owns it, that owned it on the 12th day of November, 1890?

The COURT: In the condition that it was?

Mr. MACK: In the condition that it was on the 12th of November, 1890.

Mr. GILBERT: The remainder of the land?

Mr. MACK: Yes.

The COURT: The remainder of this tract?

A. From a railroad standpoint——

Objected to by counsel for petitioner.

120 Mr. MACK: I will ask you what is the effect upon the value of the remainder because of this lack of standing room and switching facilities.

The COURT: No, no; he need not answer that.

Mr. MACK: I will ask you, then, whether the taking of this tract and the opening of the street will damage or depreciate the value of the remainder of the tract owned by the Chicago Foundry Supply Company in the condition that it was on the 12th day of November, 1890.

Objected to by counsel for petitioner as leading and improper.

The COURT: The leading question is all right. I think he may answer that. The word "damage" is a bad word.

Mr. MACK: I will strike out the word "damage."

The COURT: Will it depreciate the value, the market value?

Mr. MACK: I will accept that.

To which ruling of the court counsel for petitioner then and there duly excepted.

A. I think it is depreciated.

Q. It will be depreciated. How much do you think it will be depreciated in value from its value as it stands as a whole piece, as it stood as a whole piece on the 12th day of November, 1890, if you know?

Objected to by counsel for petitioner on the ground that the witness has not shown himself to be qualified to answer the question.

121 The COURT: Have you had anything to do with buying?

A. Not very much. I have a little.

Q. You are not in the real-estate business?

A. Not in the real-estate business.

Mr. MACK: Mr. Delano as superintendent of the Burlington road has charge of the property and knows the effect——

The COURT: No; he has charge of the terminal facilities and of the operating. You belong to the operating rather than to the real-estate department, don't you?

A. I belong to the operating department.

Objection sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Mr. GILBERT: I understand the former answer of the witness will be ruled out?

The COURT: Yes.

To which ruling of the court counsel for respondents then and there duly excepted.

122 GEORGE M. BOGUE, a witness called on behalf of the respondent-, having been first duly sworn, was examined in chief by Mr. Herrick and testified as follows:

Q. What is your full name and occupation?

A. George M. Bogue; real-estate broker.

Q. How long have you been e*h*gaged in the real estate business in Chicago?

A. A little over 24 years.

Q. What is your present firm?

A. Bogue & Company.

Q. Were you at any time railroad commissioner in this State?

A. Yes, sir; I was railroad commissioner in this State.

Q. For how long?

A. For six years.

Q. What occasion did you have in that position to become familiar with railroad matters and railroad business and railroad methods?

A. In the discharge of the business of railroad commissioner I had occasion in a general way to become somewhat familiar with the affairs of railroad companies and their facilities for doing business.

Q. And their methods of business?

A. And their methods of business

Q. Have you at any time held any other position in connection with railroad business in this region; and, if so, what?

A. After my retirement from the railroad commission I for a number of years occupied the position of arbitrator of the railroad pools; railroad traffic associations in the city of Chicago
123 covering the roads leading out of Chicago to the west, northwest, and southwest.

Q. What relations and knowledge did that position involve, Mr. Bo*f*ue?

A. In discharge of the duties incident to that office it became my duty to examine as to the terminal facilities of different railroads for doing business in what was known as competitive traffic.

Q. For what purpose or why?

A. For the purpose of determining what per cent. of the entire business should be allowed to the different railroad corporations in the traffic association.

Q. In the course of your real-estate business have you had any special experience in buying real estate for railroad purposes; and, if so, to what extent?

A. For the past ten years I have had very considerable service in buying property for railroad corporations in the city of Chicago and its immediate surroundings.

Q. Did that involve the purchases for rights of way and terminal facilities both?

A. For rights of way, for yard purposes, and for all purposes incident to the operation of the road.

Q. What railroad companies have you made such purchases for and to what extent?

A. I have purchased for the Atchison, Topeka & Santa Fé, for the Burlington road, for the Rock Island——

124 Q. How extensive were your purchases for the Atchison, Topeka & Santa Fé—that is, as to the nature of it?

A. Their entrance into the city of Chicago when they came here. I presume, perhaps, that my purchases for that road aggregated nearly a million dollars.

Q. That, of course, involved your becoming familiar with the values of real estate of the character available for railroad purposes?

A. Yes, sir.

Q. Are you familiar with the property belonging to the Chicago, Burlington & Quincy Railroad Company which it is proposed to cross by the opening of Rockwell street, being the property shown on this plat now shown you, between the blue lines, the south blue line and the north blue line and Rockwell street extended?

A. Yes, sir.

Q. What, in your opinion, was the cash market value of that land to which I call your especial attention within the proposed street on November 12th, 1890?

Objected to by counsel for petitioner as immaterial and incompetent. Objection sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. What, in your opinion, is the present cash market value of that land?

Objected to by counsel for petitioner as immaterial and incompetent; which objection was sustained by the court; to which
125 ruling of the court counsel for respondent- then and there duly excepted.

Q. What, in your opinion, was the cash market value of that part of the tract of land shown on the plat in evidence as tract A, included within the proposed street on November 12th, 1890?

Objected to by counsel for petitioner as incompetent and immaterial; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, is the present cash market value of that tract mentioned in my last question?

Objected to by counsel for petitioner as incompetent and immaterial; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assuming that the effect of opening Rockwell street across respondents' land, the land to which I have called your attention, would be to deprive the company and all who may acquire title under it of all use of the land except for railroad tracks, how much, in your opinion, will the opening of the street depreciate the value of the land?

Objected to by counsel for petitioner as incompetent and immaterial; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume the same facts in the last question, how much will the opening of the street depreciate the value of the land for
126 railroad purposes?

Objected to by counsel for petitioner as incompetent and immaterial; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume that the effect of opening the street across this land will be to deprive the company and those acquiring title under it of all use of the strip of land crosses by it except for railroad tracks, and that this use will also be subject to the right of the public to use it as a street, subject, however, to the right of the company to operate its railroad tracks, will the opening of the street depreciate or otherwise affect the market value of the land; and, if so, to what extent or in what amount?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent- then and there duly excepted.

Q. Is a piece of land which can only be used for the purpose of railroad tracks, and then only subject to the right of the public to also use it as a street, worth more or less for the purpose of sale than the same piece of land free from any restrictions as to its use in case of its sale? If you say it is worth less, what per cent. less would its market value be?

127 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume that the effect of opening the street in question will be to deprive the company and those asquiring title under it of all use of that part of the tract A crossed by it except for railroad tracks, what, in your opinion, was the cash market value of that land, free from any restrictions as to its use, and what is its cash market value subject to such restrictions?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume that at the time of the filing of the petition there were certain tracks laid on the land included within the proposed street, and that it has been otherwise unoccupied, and that the land of respondents so included is of sufficient width to make it practical to lay and operate upon it additional main tracks and additional side tracks, and that the effect of the opening of the street by these proceedings will be to deprive the company of the right to lay such additional tracks, will the value of the land which is included within

the proposed street be depreciated or otherwise diminished in
128 value for use for railroad tracks by reason of the fact that the right to lay such additional tracks is thus taken away?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. In your opinion, is the market value of land bought for a railroad right of way greater or less than the market value of the same land in the same locality bought for other purposes?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, will be the amount of depreciation, if any, to the land of the respondent company proposed to be crossed by the proposed street by reason of the opening of the street and the consequent right in the public to use it for the purposes of a street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, would be the value of the use of the land in question for railroad purposes, not subject to any right of the public to use it for the purposes of a street?

129 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, was the value of the use of the land in question for railroad purposes, not subject to any right of the public to use it for the purposes of a street, on November 12th, 1890?

Objected to by counsel for petitioner; which objection was sustained by *teh* court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. What, in your opinion, would be the value of the use of the land in question for railroad purposes, subject to the rights of the public to use it for a street, such use for the purpose of a street subject to the use by the company for railroad purposes?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assuming that the railroad company should remove its tracks from the property in question in this proceeding and offer the same for sale, what would be the fair cash market value thereof?

130 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assuming the same facts, what was such market value at the time of the filing of the petition?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume that if the proposed street is opened across the land and right of way of the railroad, the railroad company should remove its tracks from the property and offer the same for sale, what would be the cash market value of this property?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. Assume that the railroad company has a right to use the property in question for any lawful purpose, what is the market value of property for uses other than laying tracks across the same and running trains thereon?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

131 Q. How much would such market value be depreciated by subjecting the property to the perpetual right to occupy the same as a public street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. How much is the value of the use of the property in question for railroad purposes depreciated by the occupation of the same as a public street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. How much is or would be the value of the use of the property in question for purposes other than the right to lay tracks on it and operate the same be depreciated by the occupation as a public street?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

Q. How much would the value of the use of the railroad company's property other than this in question be depreciated by the opening of the proposed street?

132 Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondents then and there duly excepted.

133 Examination by Mr. READ:

Q. Are you familiar with the value of land in the vicinity of this proposed improvement as it was on November 12th, 1890?

A. I think so.

Q. What, on the 12th day of November, 1890, in your opinion, was the value as it then stood, in connection with the remainder of block 9, except the part thereof prior to that time conveyed to the railroad company, which is this small triangle up here, of the south 138 and $\frac{7}{16}$ feet of the east 33 feet of block 9, in Walker's Douglas Park addition to Chicago, the area being 4,575 square feet?

A. $2,287.50.

Q. Upon what do you base your computation, frontage or area?

A. Area.

Q. How much per square foot?

A. Fifty cents per square foot.

Q. Is the remainder of block 9 of the same value or was it at that time?

Objected to by counsel for petitioner.

Q. What was the value of the remainder of block 9?

Objected to by counsel for petitioner; which objection was
134 overruled by the court; to which ruling of the court counsel for petitioner then and there duly excepted.

A. Yes, sir.

Q. The same value?

A. Yes; the same value.

Cross-examination waived.

Mr. HERRICK: Mr. Gilbert, I have introduced certain deeds and made certain proof of title under those deeds. I suggest that I will go still further in the proof of title under those deeds, if Mr. Gilbert desires it.

Mr. GILBERT: No; I think not. I reserve, of course, the objection that I made at the time. Let the deeds stand for what they are worth.

Mr. HERRICK: You don't require me to trace title back of the deeds?

Mr. GILBERT: Oh, no; I won't do that.

Counsel for the respondent The Chicago, Burlington & Quincy Railroad Company also offered in evidence the various acts and amendments thereto passed by the legislature of Illinois which constitutes a charter of the respondent The Chicago, Burlington & Quincy Railroad Company.

It is stipulated that said several acts and amendments as printed in the printed volumes of the public and private acts of the legislature of Illinois may be referred to by the counsel of the respective parties with the same effect as if incorporated herein at length.

Said acts and amendments are as follows.

135 F. A. DELANO, recalled by leave of court on behalf of the respondent The C., B. & Q. R. R. Co., was further examined by Mr. Herrick and testified as follows:

Q. Is the land of the respondent railroad company proposed to be crossed by the proposed street used as a part of the main line of railroad and terminal facilities of the company, and was it so used at the time of the filing of the petition in this proceeding?

A. Yes, sir.

Q. Assume that the land of the respondent company to be crossed by the proposed street will be subjected by the proposed crossing to the right in the public to use it for a public street, subject, however, to the right of the railroad company to continue its use for any railroad purpose not inconsistent with such use as a street, will this right of user of the respondent company's land by the public depreciate the value of the respondent company's railroad and terminal facilities; and, if so, to what amount?

Objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent The Chicago, Burlington & Quincy Railroad Company then and there duly exeepted.

136 GEORGE M. BOGUE, recalled by leave of court on behalf of the respondent The C., B. & Q. R. R. Co., was further examined by Mr. Herrick and testified as follows:

Q. Assume that the land of the respondent company to be crossed by the proposed street will be subjected by the proposed crossing to the right in the public to use it for a public street, subject, however, to the right of the railroad company to continue its use for any railroad purpose not inconsistent with such use as a street, will this right of user of the respondent company's land by the public depreciate the value of the respondent company's railroad and terminal facilities; and, if so, to what amount?

Which question was objected to by counsel for petitioner; which objection was sustained by the court; to which ruling of the court counsel for respondent The Chicago, Burlington & Quincy Railroad Company then and there duly excepted.

The respondent The Chicago, Burlington & Quincy Railroad Company here rested, which was all the evidence given on the trial of said cause.

Thereupon the court gave to the jury on behalf of the petitioner the following instructions:

The following instructions do not apply to the questions involved between the petitioner and the owner or owners of the right of way of the Chicago, Burlington & Quincy R. R. Co. mentioned in the petition here.

137 You will determine from the evidence what will be just compensation to the respondents in this case for the property taken and for damage, if any, to the property not taken which may result from the taking of the property described in the petition for the pur-

pose named in the ordinance. Such compensation for property taken should be its fair cash market value on the 12th day of November, 1890, and the damage, if any, to the property not taken should be the difference between the market value of the property not taken when considered or used in connection with the property to be taken and the fair market value of the same property when not considered or used in connection with the land proposed to be taken and after the proposed improvement has been made—that is, if the property not taken has a greater market value when it can be used in connection with that which is taken than it has when it is not used or considered in connection with the property taken and after the proposed improvement has been made, then such difference would be the damage to the property not taken; but if the jury believe from the evidence that the property not taken has with the improvement in question as great a market value as it would have without such improvement in question and taken as a part of the whole tract, then the jury will allow no damage to property not taken.

The jury are instructed that the burden of proof is on the landowner to show damages, if any, to the part of the property not taken.

Given.

138 You are instructed that the opinions of witnesses as to the market value of the property are not conclusive, but you will give them such weight as you think them entitled to.

Given.

In determining the compensation to be awarded for the land actually taken you have nothing to do with the question as to whether any benefits will be derived from the proposed improvement, as this will be settled in another proceeding when the assessment is made to raise the money to pay the compensation awarded to owners, but in determining whether any damage will be done to property not taken you will consider whether such property not taken will derive any benefit from the proposed improvement—that is, would the market value of the property not taken be any less with the improvement there and after the taking than without the improvement and before the taking.

Given.

You will consider any evidence of sales of property near to that in question and similarly situated, if any, but you will also consider the facts and circumstances surrounding such sales or that bear on the question of market value.

Given.

The jury is instructed that they must fix the just compensation to be paid as of November 12th, 1890.

Given.

139 Just compensation means the payment of such a sum of money to the owner as will make him whole, so that he will not be any poorer by reason of the property being taken then if it had not been taken. Where property has a special value for any cause, that special value belongs to the owner. He is entitled to the market value of the property for the uses and purposes for which

it is most valuable or to which it is best adapted. And if you believe from the evidence that any of the property to be taken has a greater value for some purposes than for others, then you will fix its value with reference to the purposes for which it is most valuable, taking into consideration its location and surroundings and all the facts and circumstances shown by the evidence.

Given.

To the giving of which instructions and each of them the said respondent, The Chicago, Burlington & Quincy Railroad Company, then and there duly excepted.

Thereupon the court refused to give to the jury the following instructions asked on behalf of the respondent The Chicago, Burlington & Quincy Railroad Company:

Instructions for Respondent The Chicago, Burlington & Quincy Railroad Company.

Refused.

The jury are instructed that under the evidence the respondent The Chicago, Burlington & Quincy Railroad Company is
140 the owner in fee of that part of the land to be crossed by the proposed street referred to in the petition and evidence as occupied by it; that the petitioner seeks by the said petition and the ordinance set forth therein to acquire the right to use said land for said respondent, The Chicago, Burlington & Quincy Railroad Company, of the width of sixty-six feet for the purpose of a public highway, subject to the right of said respondent, The Chicago, Burlington & Quincy Railroad Company, to use the same for railroad purposes; that the said respondent, The Chicago, Burlington & Quincy Railroad Company, is entitled to recover as compensation by reason of the opening of said street a sum equal to the difference between the value of the fee-simple title to its said land sought to be crossed without any restrictions on the right of said respondent or those acquiring title under it to use the same for any lawful purpose and the value of its said land, subject to a perpetual right in the public to use it for the purpose of a public street, subject only to the right of said respondent or those acquiring title under it, to its use only for the purpose of railroad tracks or any purpose for which the same can be used without interfering with its said use by the public.

If the jury believe from the evidence that the land of the respondent The Chicago, Burlington & Quincy Railroad Company to be crossed by the proposed street is of such width and dimensions that it would be practicable for the said respondent or those acquiring title under it to lay and operate other railroad tracks in addi-
141 tion to those already lain thereon, the jury are instructed that said respondent is entitled to recover as part of the compensation to be awarded it in this proceeding the difference, if any, between the value of said strip for railroad purposes, with the right to lay and operate thereon such additional tracks, and the value of the same for railroad purposes, with the right to use and operate only the railroad tracks now laid on the same.

Refused.

If the jury believe from the evidence that the land of the respondent The Chicago, Burlington & Quincy Railroad Company to be crossed by the proposed street is used and was used at the time of the filing of the petition by said respondent for railroad purposes as part of its railroad and terminal facilities, and that the value of said railroad and terminal facilities will be depreciated and lessened by the use of said land of said respondent by the public for the purposes of a street (such use for the purposes of a street being subject, however, to the use of said land by said respondent for railroad purposes), then the jury are instructed that said respondent, The Chicago, Burlington & Quincy Railroad Company, is entitled to recover from the petitioner a sum equal to such depreciation in value as damages to said respondent's land not taken or crossed by said proposed street.

Refused.

To the ruling and refusing to give said instructions and
142 each of them the said respondent, The Chicago, Burlington & Quincy Railroad Company, then and there duly excepted.

And thereupon the jury rendered a verdict in said cause; which verdict is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court Thereof.

CITY OF CHICAGO }
vs. } 86019.
W. A. GOLDEN *et al.* }

Opening of Rockwell street, W. 18 to W 19th.

We, the jury, find the just compensation to be paid to the owner or owners of the following-described lots, pieces, and parcels of land and property sought to be taken or damaged by the proposed improvements — as follows, to wit:

In Walker's Douglas Park addition to Chicago, being a subd'n of E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ (except railroad land) of sec. 24, T. 39 N., range 13 east, of 3rd P. M.

To the owner or owners of the W. 33 ft. of block 5, forty-eight hundred fifty-seven $\frac{75}{100}$ dollars ($4,857.75).

To the owner or owners of the west 33 feet of block 8, sixteen hundred fifty $\frac{00}{100}$ dollars ($1,650.00).

To the owner or owners of the east 33 feet of the south
143 138.7 feet of block 9, eighteen hundred and fifty $\frac{00}{100}$ dollars ($1,850.00).

To the owner or owners of that part of the right of way of the Chicago, Burlington & Quincy Railroad Company being the 33 feet east of and adjoining the N. & S. center — of the S. E. $\frac{1}{4}$ and between the north line of bl'k 8 of said Walker's Douglas Park addition and the south line of block 5 of said Walker's Douglas Park addition, together with that part of the right of way of the

Chicago, Burlington & Quincy Railroad Company, being the 33 feet west of and adjoining said north and south center line of the S. E. ¼ and between a line drawn 138.7 feet north of and parallel to the south line of the N. E. ¼ S. E. ¼ and the southerly line of said block 5 of Walker's Douglas Park addition produced southwesterly, all in section 24, township 39 N., R. 13 east, of the 3rd P. M., one $\frac{00}{100}$ dollars ($1.00).

We, the jury, find that the remainder of the premises known as the west 348.25 feet of block five in Walker's Douglas Park addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the west thirty-three feet thereof and the proposed opening and widening of Rockwell street.

And we, the jury, find that the remainder of the premises known as block nine (9), except that part thereof conveyed to the Chicago, Burlington & Quincy Railroad Company in Walker's Douglas Park addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the east thirty-three feet thereof for the proposed opening and widening of Rockwell street.

144 M. F. FITCH.
NELSON H. PATNAE.
S. W. DUNLAP.
ALBERT L. BURKETT.
JAMES TUCKER.
JOHN J. DOHM.
AUGUST SWANSON.
H. M. JEWELL.
E. C. BAND.
H. MADSON.
WM. E. HAHN.
HALVER MICHELSON, *Foreman.*

And thereupon said verdict having been returned into court, the same was entered of record in the words and figures following, to wit:

Order of July, '92.

CITY OF CHICAGO
v.
W. A. GOLDEN *et al.* } 86019. Petition.

In the matter of the petition of the City of Chicago for the ascertainment of the just compensation to be made for private property to be taken or damaged for the opening of Rockwell street from West 18th St. to West 19th street.

145 This cause being called for trial, come the parties hereto by their attorneys respectively.

Thereupon it is ordered that a jury come. Thereupon come the jurors of the jury of good and lawful men, to wit:

M. F. Fitch,
Nelson H. Patmae,

S. W. Dunlap,
A. L. Burkett,
James Tucker,
J. J. Dohn,
August Swanson,
H. M. Jewell,
E. C. Band,
H. Madson,
W. E. Hahn,
H. Michelson,

Who, having been duly selected, examined, and sworn well and truly to ascertain and report just compensation to the owner or owners of the property sought to be taken or damaged by these proceedings and to each person therein interested, according to the facts as they shall be made to appear from the evidence, and having heard the evidence, the arguments of counsel, and the instructions from the court, bring in their verdict, whereby they do say:

"We, the jury, find the just compensation to be paid to the owner or owners of the following-described lots, pieces, and parcels of land and property sought to be taken or damaged by the
146 proposed improvement as follows, to wit:

"In Walker's Douglas Park addition to Chicago, being a subd'n of E. ½ S. E. ¼ and the E. ½ of W. ½ of S. E. ¼ (except railroad land) of sec. 24, T. 39 N., range 13 east, of 3rd P. M.

"To the owner or owners of the W. 33 ft. of block 5, forty-eight hundred fifty-seven $\frac{75}{100}$ dollars ($4,857.75).

"To the owner or owners of the west 33 feet of block 8, sixteen hundred fifty $\frac{00}{100}$ dollars ($1,650.00).

"To the owner or owners of the east 33 feet of the south 138.7 feet of block 9, eighteen hundred and fifty $\frac{00}{100}$ dollars ($1,850.00).

"To the owner or owners of that part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the 33 feet east of and adjoining the N. & S. center line of the S. E. ¼ and between the north line of bl'k 8 of said Walker's Douglas Park addition and the south line of block 5 of said Walker's Douglas Park addition, together with that part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the 33 feet west of and adjoining said north and south centre line of the S. E. ¼ and between a line drawn 138.7 feet north of and parallel to the south line of the N. E. ¼ S. E. ¼ and the southerly line of said block 5 of Walker's Douglas Park addition produced southwesterly.

"All in sec. 24, township 39 N., R. 13 east, of the 3rd P. M., one $\frac{00}{100}$ dollars ($1.00).

"We, the jury, find that the remainder of the premises known
147 as the west 348.25 feet of block five in Walker's Douglas Park addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the west thirty-three feet thereof and the proposed opening and widening of Rockwell street.

"And we, the jury, find that the remainder of the premises known as block nine (9), except that part thereof conveyed to the Chicago, Burlington & Quincy Railroad Company, in Walker's Douglas Park

addition to Chicago, in Cook county, Illinois, will not be damaged by the taking of the east thirty-three feet thereof for the proposed opening and widening of Rockwell street."

And thereupon the respondent The Chicago, Burlington & Quincy Railroad Company, after the coming in of said verdict, entered its motion for a new trial and filed in said cause a motion for a new trial and reasons therefor in writing; which said motion is in words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss:*

In the Circuit Court of said County.

CITY OF CHICAGO }
vs.
W. A. GOLDEN *et al.* }

In the matter of the petition for the opening of Rockwell street.

And now comes the Chicago, Burlington & Quincy Railroad Company, by Herrick & Allen, its attorneys, and moves
148 the court to set aside the verdict rendered and grant a new trial in this cause as to the property described as follows in the verdict, to wit:

That part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the thirty-three (33) feet east of and adjoining the north and south center line of the southeast quarter and between the north line of block eight (8) of said Walker's Douglas Park addition and the south line of block five (5) of said Walker's Douglas Park addition, together with that part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the thirty-three (33) feet west of and adjoining said north and south centre line of the southeast quarter and between a line drawn one hundred and thirty-eight and seven-tenths (138.7) feet north of and parallel with the south line of the northeast quarter southeast quarter and the southerly line of said block five (5) of Walker's Douglas Park addition, produced southwesterly, all in section twenty-four (24), township thirty-nine (39) N., R. thirteen (13) east, of the third P. M.

And for the grounds of said motion the respondent The Chicago, Burlington & Quincy Railroad Company shows to the court the following:

1. The court admitted on the trial improper evidence on the part of the petitioner.

2. The court refused to admit proper evidence offered by this respondent.

149 3. The court erroneously overruled the respondent's motion to exclude improper evidence from the jury.

4. The court gave erroneous and improper instructions to the jury on behalf of the petitioner.

5. The court refused proper instructions asked for this respondent.

6. The verdict is contrary to law.

7. The verdict is contrary to the evidence.

8. The several rulings of the court in excluding proper evidence offered for this respondent were contrary to the 14th amendment of the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its limits the equal protection of the laws."

9. The several rulings of the court in refusing proper instructions asked for this respondent were contrary to said 14th amendment.

10. The statute of the State of Illinois on which said proceeding is based is contrary to said 14th amendment.

11. The verdict of the jury deprives this respondent of its property without due process of law and of the equal protection of the laws, contrary to said 14th amendment.

12. The several rulings of the court in refusing proper evidence asked for this respondent were contrary to article 1 of the Con-
150 stitution of the United States, which provides that no State shall pass any *ex post facto* law or law impairing the obligation of contracts.

13. The several rulings of the court refusing instructions asked for this respondent were contrary to said article 1 of the Constitution of the United States.

14. The said statute on which said proceedings are based is contrary to said article 1 of the Constitution of the United States.

15. The said statute is contrary to the 5th amendment to the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation.

16. Said statute is contrary to article 2 of the constitution of the State of Illinois, which provides that private property shall not be taken or damaged for public use without just compensation.

And afterwards, to wit, on the 28th day of July, A. D. 1892, the following, among other, proceedings were had and entered of record in said court, which are in the words and figures following, to wit:

In the matter of the petition of the City of Chicago for the ascertainment of the cost of opening and widening Rockwell street from W. 18th to W. 19th St.

CITY OF CHICAGO
vs.
GOLDEN *et al.* } 86019. Petition.

151 This cause coming on this day to be heard, comes the City of Chicago, by its attorney, Charles C. Gilbert, and the Chicago, Burlington & Quincy Railroad Company, by Herrick & Allen, its attorneys; the Chicago Foundry Supply Company, by Julian W. Mack, its attorney, and John T. Snodgrass, by Frank F.

Reed, his attorney; whereupon, by motion of the petitioner, by its attorney, the petition herein is amended so that part thereof that reads as follows:

That part of the right of way of the Chicago, Burlington & Quincy Railroad Company and of the 4.72 acres of the S. E. ¼, section 24, 39, 13, conveyed by Allan Robbins to the C., B. & Q. R. R. Co., called tract "A," lying between the east line produced respectively northwardly and southwardly of the west 33 feet of blocks 5 and 8 and between the west line produced northwardly of the east 33 feet of block 9, all of said Walker's Douglas Park addition to Chicago, may read as follows, to wit:

That part of the right of way of the Chicago, Burlington & Quincy Railroad Company being the 33 feet east of and adjoining the N. and S. center line of the S. E. ¼ and between the north line of block 8 of said Walker's Douglas Park addition and the south line of block 5 of said Walker's Douglas Park addition, together with that part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the 33 feet west of and adjoining said north and south centre line of the S. E. ¼ and between a line drawn 138.7 feet north of and parallel to the south line of the N. E. ¼ S. E.
152 ¼ and the southerly line of said block 5 of Walker's Douglas Park addition produced southwesterly, all in section 24, twp. 39 N., R. 13 east, of the 3rd P. M.

And this cause coming on to be heard upon the motion of the respondents to set aside the verdict of the jury heretofore rendered herein, and the court, having heard the arguments of counsel and being fully advised in the premises, doth overrule and deny said motion; to which ruling of the court the said respondent duly excepted.

And thereupon the said City of Chicago, by its said attorneys, moves for judgment upon said verdict, and, the court being fully advised in the premises, it is considered and adjudged by the court that the respective sums of money awarded by the jury in and by their said verdict to the owner or owners of said lots, pieces, and parcels of land and property are and each of them is a just compensation to the owner or owners thereof for the taking and damaging of such lots, pieces, and parcels of land and property by the proposed public improvement mentioned in said petition, and said owner or owners shall respectively accept from said City of Chicago such sum or sums as are so awarded on account of the lots, pieces, and parcels of land and property so owned by him, her, or them respectively, all of said lots, pieces, and parcels of land and property being in the city of Chicago, county of Cook and State of Illinois, and that upon payment to the county treasurer of Cook county, Illinois, by the said City of Chicago of the said several sums of
153 money for the use of the owner or owners of any or each of the said lots, pieces, and parcels of land and property, or upon proof made to or before the court that the said sums of money or any of them have been paid to the owner or owners respectively of said lots, pieces, and parcels of land and property, the City of Chicago shall have the right, at any time thereafter, to take posses-

sion of and damage the property in respect to which such compensation shall have been so paid or deposited.

To which decision of the court and the entry of said judgment the respondent The Chicago, Burlington & Quincy Railroad Company, by its attorney, duly excepts, and prays an appeal to the supreme court of Illinois, which is by the court allowed upon its filing an appeal bond in the penal sum of $250, together with its bill of exceptions, by September 24th, 1892.

And forasmuch, therefore, as the above and foregoing matters do not appear of record, save by bill of exceptions, this bill of exceptions is signed, sealed, and ordered filed the 24 day of September, 1892.

FRANK BAKER, [SEAL.]
Judge of Circuit Court of Cook County.

Presented to me this 24th day of September, 1892.
FRANK BAKER,
Judge of the Circuit Court of Cook County.

Satisfactory.
CHARLES C. GILBERT.

154 Be it remembered that on the 19th day of September, A. D. 1892, there was filed in said court a certain appeal bond, which is in the words and figures following, to wit:

Know all men by these presents that the Chicago, Burlington & Quincy Railroad Company, a corporation duly organized and existing under the laws of the State of Illinois, as principal, and J. C. Peasely, of the county of Cook and the State of Illinois, as surety, are held and firmly bound unto the City of Chicago, a municipal corporation of the State of Illinois, in the penal sum of two hundred and fifty dollars ($250), lawful money of the United States; for the payment of which, well and truly to be made, they bind themselves, their respective successors, heirs, executors, administrators, and assigns, jointly, severally, and firmly, by these presents.

In witness whereof the said Chicago, Burlington & Quincy Railroad Company has caused its corporate name to be hereunto signed by J. C. Peasly, its first vice-president, and its corporate seal to be hereto attached, duly attested, and the said J. C. Peasly has hereunto set his hand and seal this fifteenth day of September, A. D. 1892.

The condition of the above obligation is such that whereas the circuit court of Cook county, in the State of Illinois, did, on the 28th day of July, A. D. 1892, and of the July term, A. D. 1892, thereof, in a certain cause therein pending, wherein The City of Chi-
155 cago was petitioner and the said Chicago, Burlington & Quincy Railroad Company and others were respondents, enter it- certain judgment awarding to said Chicago, Burlington & Quincy Railroad Company the sum of one (1) dollar as just compensation to it as the owner of the following-described property in the petition as amended in said cause: That part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being

the thirty-three (33) feet east of and adjoining the north and south centre line of the southeast quarter and between the north line of block eight (8) of Walker's Douglas Park addition and the south line of block five (5) of said Walker's Douglas Park addition, together with that part of the right of way of the Chicago, Burlington & Quincy Railroad Company, being the thirty-three feet west of and adjoining said north and south center line of the southeast quarter and between a line drawn one hundred and thirty-eight and $\frac{7}{10}$ feet north of and parallel with the south line of the northeast quarter southeast quarter and the southerly line of said block 5 of Walker's Douglas Park addition produced southwesterly, all in section twenty-four (24), township thirty-nine (39) north, range 13 east, of the third principal meridian, from which said judgment of the said circuit court of Cook county the said Chicago, Burlington & Quincy Railroad Company has prayed for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said Chicago, Burlington and Quincy Railroad Company shall duly prosecute its said appeal with effect and, moreover, pay the amount of any judgment, costs, and dam-
156 ages rendered and to be rendered against it in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
By J. C. PEASLEY, *1st Vice-Pres.*
[SEAL.] J. C. PEASELEY, *Surety.* [SEAL.]

Attest:
[CORPORATE SEAL.] H. W. WEISS,
Ass. Secretary.

Approved by me in open court this 19th day of September, A. D. 1892.

FRANK BAKER,
Judge of Circuit Court.

And thereupon, on the 27th day of September, A. D. 1892, there was filed in said court a certain præcipe for record, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County. }

157 In the Circuit Court of said County.

CITY OF CHICAGO
vs. } 86019.
CHICAGO, BURLINGTON AND QUINCY R. R. Co. *et al.*

The clerk will please make transcript of record for supreme court of Illinois in the above-entitled cause as follows:

Petition for condemnation, filed Nov. 12th, 1890.

Summons, filed Nov. 22d, 1890.

Appearance D., H. & A., filed Dec. 15th, 1890.

Certificate of publication, filed Feb. 12th, 1891, and all orders made and entered of record in the above cause.

The original bill of exceptions in said cause to be inserted instead of copy, as provided by statute.

Appeal bond.

HERRICK & ALLEN,
Attorneys for Respondent C., B. & Q. R. R. Co.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid,
158 do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record according to præcipe filed and heretofore copied herein in a certain cause lately pending in said court, on the common-law side thereof, between City of Chicago, petitioner, and W. A. Golden *et al.*, defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 30th day of September, 1892.

[SEAL.] HENRY BEST, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Supreme Court of Illinois, Northern Grand Division.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Impleaded with W. A. GOLDEN *et al.*, Appellant,
vs.
CITY OF CHICAGO, Appellee.

And now comes the Chicago, Burlington and Quincy Railroad Company, by Herrick & Allen, its attorney-, and says that in the record and proceedings and in rendering judgment aforesaid there is manifest error in this, to wit:

1. The court below admitted improper evidence on the part of appellee.
159 2. The court below rejected proper evidence offered by appellant.
3. The court below erred in overruling appellant's motion to exclude improper evidence from the jury.
4. The court below erred in overruling appellant's motion to dismiss the petition.
5. The court below erred in giving erroneous and improper instructions asked on behalf of appellee.
6. The court erred in refusing proper instructions asked by appellant.

7. The court erred in denying the motion of appellant to set aside the verdict of the jury and for a new trial.

8. The court erred in rendering judgment in favor of appellee and against appellant.

9. The several rulings of the court below were contrary to the 14th amendment of the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its limits the equal protection of its laws."

10. The statute of the State of Illinois on which said petition is based is contrary to the said 14th amendment.

11. The judgment of the court below deprives this appellant of its property without due process of law and of the equal protection of the laws, contrary to said 14th amendment.

160 12. The said statute on which said proceedings are based is contrary to the article of the Constitution of the United States which provides that no State shall pass any *ex post facto* law or law impairing the obligation of contracts.

13. The said statute is contrary to the 5th amendment to the Constitution of the United States, which provides that the private property shall not be taken for public use without just compensation.

14. Said statute is contrary to article 2 of the constitution of the State of Illinois, which provides that private property shall not be taken or damaged for public use without just compensation.

15. The judgment of the court below is contrary to said several provisions of the Constitution of the United States.

By reason whereof the appellant prays that said judgment may be reversed, etc.

HERRICK & ALLEN,
Attorneys for Appellant.

161 STATE OF ILLINOIS, } ss:
County of Cook, }

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellant,
vs.
THE CITY OF CHICAGO, Appellee. } No. 91.

On appeal to the supreme court of the State of Illinois.

Whereas the record filed in the above-entitled cause is incomplete by reason of the fact that certain orders and appellant's cross-petition and a certain plat were accidentally omitted from the same:

It is hereby stipulated by and between the attorneys for the parties in said cause that a supplemental record be made up and certified and filed with the clerk of the Supreme Court.

HERRICK & ALLEN,
Attorneys for Appellant.
CHARLES C. GILBERT,
Attorney for Appellee.

162 UNITED STATES OF AMERICA, } ss:
State of Illinois, Cook County, }

Pleas before the Honorable Frank Baker, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 18th day) of July, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

Present: Honorable Frank Baker, one of the judges of the circuit court of Cook county, State of Illinois; J. M. Longenecker, State's attorney; James H. Gilbert, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that on the 30th day of June, A. D. 1892, there was filed in said court a certain cross-petition and two certain motions, which are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of said County.

163 CITY OF CHICAGO
v.
W. A. GOLDEN and THE CHICAGO, Burlington and Quincy Railroad Company and Others.
} Condemnation Proceedings for the Opening of Rockwell street.

The cross-petition of The Chicago, Burlington and Quincy Railroad Company, one of the owners of the land described in the petition in the above proceeding.

Your cross-petitioner, The Chicago, Burlington and Quincy Railroad Company, states and shows to the court that in addition to the land described in said petition as owned by your cross-petitioner, and which is sought to be condemned for the opening of the street mentioned in said petition, your cross-petitioner is the owner of the land on each side of the said land sought to be condemned (being all of the land between the lines marked on the plat attached to said ordinance mentioned in said petition as "R. R. fence" extended, and the right of way of the Pittsburg, Chicago, Cincinnati and St. Louis railway); that the effect of opening said street over the said land of your cross-petitioner sought to be condemned will be to deprive your cross-petitioner of the use and value of said land so condemned for all purposes except for railroad tracks laid thereon; that said land which it is sought to con-
164 demn is and has been used by your cross-petitioner, so far as the same has heretofore been used in connection with the said land sought to be condemned, for the operation of its main line of railroad and for side tracks necessary in carrying on its railroad business and industries located thereon and connected with said

tracks; that the said land not so used is capable of being further used for the same or similar purposes and for other railroad purposes and for manufacturing, industrial, and other purposes; that said other land so owned by your cross-petitioner also has a special value in connection with the said land sought to be taken as a part of one piece or parcel of land; that if your cross-petitioner shall continue the use of the land sought to be condemned for its railroad tracks as heretofore your cross-petitioner will be prevented by the opening of said street from using the same for other railroad tracks as may become necessary or convenient for its business and as the same might be used if said street should not be so opened and will be thereby deprived in large part of the use and value of said land not taken and condemned for which the same might be used by your cross-petitioner or its grantees; that the taking of said land sought to be condemned and the opening of said street will also interrupt the railroad business of your petitioner and the operation of its railroad and will make it necessary for your cross-petitioner in order to operate its railroad with proper safety and to prevent additional loss or damage to construct approaches to the crossing
165 made by opening said street, to plank the track at the crossing, to drain its side crossings and the adjoining land owned by it, to erect gates at said crossing and to keep gatemen thereat, and will also require other necessary exoenditures by your cross-petitioner, all of which will cause your cross-petitioner great expense; that by the opening of said street the value of said land occupied by the street for the purposes of sale or lease will be wholly destroyed; that the said land of this respondent proposed to be crossed by said street is used and was used at the date of the filing of the petition as part of the main line of railroad and terminal facilities of this respondent; that the proposed use of said land by the public for the purposes of a public street will depreciate the value of this respondent's said railroad and terminal facilities to a large amount and thereby said railroad and terminal facilities will be greatly damaged, to the great damage of your cross-petitioner. Your cross-petitioner therefore prays that the said damages to the land of your cross-petitioner not sought to be condemned may be duly assessed and awarded to your cross-petitioner.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
By JOHN J. HERRICK AND
CHESTER M. DAWES, *Its Attorney-*.

Filed June 30th, 1892.

HENRY BEST, *Clerk.*

166 STATE OF ILLINOIS, } ss:

91

Proposed Opening of Rockwell St. from W. 18th St. to W. 19th St.

166 STATE OF ILLINOIS, } ss :
County of Cook, }

In the Circuit Court of said County.

In the Matter of the Petition of THE CITY OF CHICAGO
vs.
W. A. GOLDEN and THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY for the Opening of Rockwell Street.

And now comes the Chicago, Burlington and Quincy Railroad Company, by John J. Herrick and Chester M. Dawes, its attorneys, and moves the court to require The City of Chicago, the petitioner, to furnish and file in this court a plan definitely specifying and designating or otherwise to state and specify of record in what manner and at what grade and level with reference to the grade and level of the railroad of this defendant the said Rockwell street will be extended and opened across the said right of way and railroad of the defendant The Chicago, Burlington and Quincy Railroad Company.

By JOHN J. HERRICK AND
CHESTER M. DAWES,
Att'ys for Respondent C., B. & Q. R. R. Co.

Filed June 30th, 1892.

HENRY BEST, *Clerk.*

167 STATE OF ILLINOIS, } ss :
County of Cook, }

In the Circuit Court of said County.

In the Matter of the Petition of THE CITY OF CHICAGO
vs.
W. B. GATES and THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY for the Opening of 21st Street.

And now comes the Chicago, Burlington and Quincy railroad, by John J. Herrick and Chester M. Dawes, its attorneys, and moves the court to require The City of Chicago, the petitioner, to state or otherwise specify of record whether the right sought to be acquired to cross the right of way of the respondent The Chicago, Burlington and Quincy Railroad Company is a right to cross the same subject to a right in said company to lay such other tracks on said right of way as it may see fit, in addition to those already laid thereon, or whether the right sought to be acquired is to be subject to the use by this respondent of the railroad tracks laid and in use on said land at the time said petition was filed.

By JOHN J. HERRICK AND
CHESTER M. DAWES,
Attorneys for Respondent C., B. & Q. R. R. Co.

Filed June 30th, 1892.

HENRY BEST, *Clerk.*

(Here follows map marked p. 168.)

169 STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keepers of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain cross-petition filed in said court June 30th, 1892, and two certain motions filed June 30th, 1892; also copy of plat attached to original petition filed November 12th, 1890, in a certain cause lately pending in said court, on the common-law side thereof, between The City of Chicago, petitioner, and The C., B. & Q. R. R. Co. *et al.*, defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 31st day of October, 1892.

HENRY BEST, *Clerk.*

170 And afterwards, to wit, on the 4th day of October, 1892, certain orders were made by said court and entered of record, among which is the following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Cook.

Now, on this day, comes the said appellant, by counsel, and moves the court for time to file abstracts of record and briefs of counsel; which motion is taken under advisement.

And afterwards, to wit, on the 5th day of October, 1892, certain proceedings were had and orders made by said court and entered of record, among which is the following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Cook.

And now, on this day, the court having duly considered the motion of appellant for time to file abstracts and briefs and being fully advised in the premises, it is considered and ordered by the court that the time for filing abstracts and briefs be extended ten days.

171 And afterwards, to wit, on the 19th day of October, 1892, certain proceedings were had and orders made by said court and entered of record, among which is the following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

172 And afterwards, to wit, on the 25th day of October, 1892, certain proceedings were had and orders made by said court and entered of record, among which is the following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Cook.

And now, on this day, comes the said appellees and moves the court for an extension of time to file briefs in this cause; which motion is taken under advisement.

And afterwards, to wit, on the 28th day of October, 1892, certain proceedings were had and orders made by said court and entered of record, among which is the following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Cook.

And now, on this day, it is considered by the court that the time for filing briefs herein on the part of appellee be extended ten days.

173 At a supreme court begun and held at Ottawa, on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within and for the northern grand division of the State of Illinois.

Present: David J. Baker, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; Joseph M.

Bailey, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Maurice T. Moloney, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered, to wit, on the 31st day of March, A. D. 1894, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO.	No. 2876. 51, A. D. Appeal from Cook.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and
174 concerning the premises, for that it appears to *appears to* the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

175 At a supreme court begun and held at Ottawa, on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within and for the northern grand division of the State of Illinois.

Present: David J. Baker, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Maurice T. Moloney, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the 31st day of March, 1894, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *vs.* CITY OF CHICAGO.	No. 51, A. D. Error to —. Appeal from Cook.

176 No. 51, A. D.

Opinion by Magruder, J.

This is a condemnation proceeding instituted in pursuance of an ordinance passed by the common council of the city of Chicago for the purpose of opening and widening Rockwell street from West

18th street to West 19th street, across the track and right of way of the appellant company.

The questions raised by the assignments of error and growing out of the admission and exclusion of testimony and the giving and refusal of instructions by the court below are the same questions which have been passed upon in the following cases, recently decided by this court: I. C. R. R. Co. *v.* City of Chicago, 138 Ill., 453; C. & N. W. R'y Co. *v.* City of Chicago, 140 Ill., 309, and I. C. R. R. Co. *v.* City of Chicago, 141 Ill., 586.

It is claimed, however, by counsel for appellant that the railroad company in this case owns the fee of the ground at the point where it is proposed to extend the street across the right of way and the tracks located thereon, and that for this reason the court below erred in refusing to admit certain testimony in regard to value.

Counsel introduced in evidence deeds from private owners conveying to the company certain portions of its right of way, including the portion sought to be crossed by the street, and then proposed to prove the market value of the portion thus crossed for sale
177 or use for any lawful purpose in case the tracks should be removed.

Where a city council, under the power conferred by paragraph 89 of section 1 of article 5 of the City and Village Act, extends a street across railroad tracks or right of way, it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way. Hence, the value of the land embraced within the crossing is not the measure of just compensation for such interest as may be taken. The measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purposes of a street, such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks caused by the existence and use of the street. Even the cases relied upon by counsel as holding that the company is entitled to damages for fences, sign-boards, cattle-guards, etc., concede that the value of the land is not a legitimate element of compensation when a highway or street is laid across a railroad, because the owner of the railroad is not, as the owner of land ordinarily is, excluded from the beneficial use of the property.

If the value of the land is not a legitimate element of compensation its market value for sale at the termination of the existing use and its market value for some other use to which it may be adapted are also excluded. Hence, we do not regard it as material
178 whether the right of way is owned in fee by the company or has been obtained by condemnation so as to leave the fee in the former owner, as required by the present constitution of the State. (Cons., sec. 13, art. 2; 1 Starr & Cur. Stat., p'ge 105; Elliot on Roads and Streets, pages 170 and 171; Pierce on Railroads, page 193; 6 Am. & Eng. Enc. of Law, page 554; Boston & A. R. R. Co. *v.* Vil. of Green St., 52 N. Y., 510.)

The contention of counsel is that the portion of the right of way

over which the city proposes to extend the street was subject to sale and use for every lawful purpose, and that by the opening of the street its salable value was practically destroyed and appellant was limited to a narrow and restricted use, which might at any time be wholly valueless. The correctness of this contention does not follow from the fact that the part of the right of way which embraces the proposed crossing was acquired by conveyance rather than by condemnation.

A railroad company can only acquire land, whether by voluntary purposes or otherwise, for railroad purposes as defined in its charter. It does not hold land, as does the ordinary owner, with the right of using it for any purpose to which it may be adapted, or with the right to sell it at the highest price which it may bring in the market. Its capacity to acquire or hold lands is not general, like that of a natural person, but is limited to the uses of the railroad business. Being a creature of law, it possesses only those
179 powers which are conferred upon it by its charter, either expressly or as incidental to the objects of its organization. Albany N. R. R. Co. *v.* Brownell, 24 N. Y., 345; Rumsey *v.* N. Y. & N. E. R. R. Co, 114 N. Y., 423; N. Y. C. & H. R. R. Co. *v.* Aldridge, 135 N. Y., 83.

In this case the descriptions of the strips of land conveyed to the appellant, as set forth in the conveyances introduced in evidence, show that the strips were purchased for railroad right of way, and they have been ever since so used. Where a railroad company has once exercised the power to determine the location of its road, that power is exhausted. It cannot change the location without legislative authority, after it has exercised its discretion as to the selection of the route of its road between certain fixed points. I. C. R. R. Co. *v.* The People, 143 Ill., 434. It is manifest that the appellant is restricted in its use of the right of way over which this street is to be extended to those purposes for which such right of way is now used. The future use must be the same as the present use so long as the appellant continues to operate its railroad, unless the legislature shall permit it to change its route. Where lands are restricted by law or by the terms of a grant to a particular use, the measure of compensation in a condemnation proceeding to the owner for the lands taken will be their value to him for the special use to which they are restricted. So, where there can be no market value of land by reason of its use as part of an extensive business or enterprise, its value must be determined by the use to
180 which it is applied. I. C. R. R. Co. *v.* City of Chicago, 141 Ill., 509; Lewis on Em. Dom., sec. 485. Hence, we think that there was no error in excluding testimony offered for the purpose of showing the general salable value of the right of way included in the crossing or its general value for other uses than that to which it was applied. This would be true if the measure of the compensation was the value of the use of the right of way as such. Much more is it true where the thing taken is merely such "portion of the railroad company's exclusive right to the occupancy, use,

and control of its right of way" as is diminished by its use for the purposes of a street crossing.

Counsel say that the appellant might cease to use the portion of the right of way at the place of crossing for the purpose for which it is now used, and that in such case it would be prevented from selling the fee by reason of the easement acquired by the public for a street. The use of its right of way as such by a railroad company, in a certain sense, — be as well regarded as a perpetual use or as the use by a city of the easement acquired for a street. Henry *v.* The Dubuque & P. R. R. Co., 2 Iowa, 288; 2 Wood on Railroads, sec. 245, note 2. It is true that the railroad company may at some future day cease to exist by forfeiture of its charter or otherwise, but so, also, the city may cease to use a street by vacation thereof or otherwise. The possibility supposed by counsel is too remote to be used as a basis of value. In such a proceeding as this
181 "nothing should be allowed for imaginary or speculative damages or such remote or inappreciable damages as the imagination may conjure up and which may or may not occur in all the future." Jones *v.* C. & I. R. R. Co., 68 Ill., 380; P. & P. W. R'y Co., 105 Ill., 110. Possible or imaginary uses are to be excluded, nor can the owner show the probable future use of the property. Pierce on Railroads, p'ge 217; Lewis on Em. Dom., sec. 480.

The rule that where land is condemned its value may be estimated not only with reference to the uses to which it is actually applied, but also those to which it is adapted, is subject to the qualification that the latter uses must be those which enter into and affect its market value. Haslam *v.* G., Q., S. W. R. R. Co., 64 Ill., 353; C. & E. R. R. Co. *v.* Jacobs, 110 Ill., 414; 6 Am. & Eng. Enc. of Law, p'ge 569. It is also true that in estimating the compensation to the owner, with reference to the uses for which the property is suitable, regard must be had to the existing business or wants of the com-unity or such as may be reasonably expected in the immediate future. Miss. & Rum. River Boom Co. *v.* Patterson, 98 U. S., 403; 2 Wood on R. R., sec. 259. It is quite clear that none of these considerations could have any application here. The company was using its right of way for the most valuable purpose to which it was adapted—that is to say, for the operation of its road by the passage of trains and cars over its tracks. King *v.* Minn. W. R. Co.,
182 32 Minn., 224. It was entitled to be compensated for the extent to which this use would be lessened in value by the extension of the street over its tracks or for the value of so much of this use as would be taken by the city for the street. No testimony was offered by the respondent upon this precise question so far as we are able to discover.

The verdict is in accordance with such evidence as was introduced upon that subject by the petitioner.

The remaining question discussed by counsel for appellant relates to the refusal of the trial court to admit testimony to show that it would be necessary to construct gates and plank the crossing and employ a flagman if the street should be opened. We do not think

that there was any error in this refusal for the reasons stated in C. & N. W. R'y Co. *v.* City of Chicago, 140 Ill., 309.

The judgment of the circuit court is affirmed.

Judgment affirmed.

183 To the Honorable David J. Baker, chief justice of the supreme court of Illinois:

And now comes the Chicago, Burlington & Quincy Railroad Company, by Herrick, Allen & Boyesen, its attorneys, and complain*ants* that in the re*cord* and proceedings, and also in the rendition of a judgment in a suit between The Chicago, Burlington & Quincy Railroad Company, appellant, and The City of Chicago, appellee, in the supreme court of the State of Illinois, northern grand division, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against it on the 31st day of March, 1894, in said suit, wherein was drawn in question:

First. The validity of an act of the General Assembly of the State of Illinois entitled "An act to provide for the exercise of eminent domain," approved April 10th, 1872, and in force July 1, 1872, as being repugnant to the fourteenth amendment of the Constitution of the United States; and also

Second. Wherein by the record, proceedings, and judgment in said suit was drawn in question the validity of said statute as being contrary to section 10 of article 1 of the Constitution of the United States, which provides that no State shall pass any *ex post facto* laws or law impairing the obligation of a contract; and also

Third. Wherein was drawn in question, under the rulings and judgment of said court, the validity of said statute as being con-
184 trary to the fifth amendment to the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation; and also

Fourth. Wherein was drawn in question the validity of said statute, under the rulings and judgment of said court thereon, as depriving the said The Chicago, Burlington & Quincy Railroad Company of its property without due process of law and denying to it the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States; and also

Fifth. Wherein was drawn in question by the rulings and judgment of said court on the statute of the State of Illinois, whereon said suit was based, the validity of said statute as depriving it, the said railroad company, of its property without due process of law and denying to it the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States.

Sixth. Because the effect and operation of the final judgment rendered in said cause by the supreme court of Illinois is to deprive the Chicago, Burlington & Quincy Railroad Company *if* its prop-

erty without due process of law and to deny to it the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States, and such effect and operation of said judgment was by the record and proceedings in said cause drawn in question;

All of which appears in the record and proceedings in said suit, whereby manifest error has happened, to the great damage
185 of the said The Chicago, Burlington & Quincy Railroad Company. Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

HERRICK, ALLEN & BOYESEN, *Attorneys.*

The writ of error herein prayed for is hereby allowed.

DAVID J. BAKER,
Chief Justice of the Supreme Court of the State of Illinois.

May 11th, 1894.

(Endorsed:) Filed May 19, 1894. A. H. Taylor, clerk.

186 Know all men by these presents that we, The Chicago, Burlington & Quincy Railroad Company, as principal, and Ingolf K. Boyesen, of Chicago, Illinois, as surety, are held and firmly bound unto the City of Chicago, in the said State of Illinois, in the full and just sum of five thousand dollars ($5,000.00), to be paid to the said City of Chicago, its certain attorney or successors; to which payment, well and truly to be made, we, the said The Chicago, Burlington & Quincy Railroad Company, for itself, its successors and assigns, and the said Ingolf K. Boyesen, for himself, his heirs, executors, and administrators, bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a supreme court of the State of Illinois within and for the northern grand division thereof, in a suit depending in said court between The Chicago, Burlington & Quincy Railroad Company, as appellant therein, and the said City of Chicago, as appellee therein, a judgment was rendered against the said The Chicago, Burlington & Quincy Railroad Company, and the said The Chicago, Burlington & Quincy Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Chicago, citing and admonishing it to be and appear at a Supreme Court of the United
187 States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Chicago, Burlington & Quincy Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages

if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, [SEAL.]
By J. C. PEASLEY, *1st Vice-Pt.*
INGOLF K. BOYESES. [SEAL.]

[Corporate Seal.]

Attest: H. W. WEISS,
Ass't Secu-tary.

Sealed and delivered in presence of—
—— ——.

Approved by—
DAVID*E* J. BAKER,
Chief Justice of the Supreme Court of the State of Illinois.

May 11th, 1894.

(Endorsed:) Filed May 19, 1894. A. H. Taylor, clerk.

188 In the Supreme Court of the United States.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
v.
THE CITY OF CHICAGO, Defendant in Error.

And now comes the said The Chicago, Burlington & Quincy Railroad Company, by John J. Herrick, its attorney, this 11th day of May, A. D. 1894, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

That said supreme court of the State of Illinois erred in rendering its said judgment in this, that the plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, was and is thereby deprived of its property without due process of law, contrary to the fifth amendment to the Constitution of the United States.

II.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that by the said judgment the property of the plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, was taken for public use without just compensation, contrary to the fifth amendment to the Constitution of the United States.

189 III.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that the plaintiff in error, The

Chicago, Burlington & Quincy Railroad Company, was and is thereby deprived of its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

IV.

That said supreme court of the State of Illinois erred in adjudging by its said judgment of affirmance of the judgment of condemnation in said cause that the plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, was only entitled to the nominal compensation of one dollar for its property taken and condemned by the said judgment of condemnation.

V.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that by the said judgment the plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, is denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

VI.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois whereon said proceedings and judgment are based,
190 being paragraph 89 of section 1 of article V of an act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, as construed and enforced by said judgment of said supreme court of the State of Illinois, is repugnant to the Constitution of the United States and the amendments thereto.

VII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois whereon said proceedings and judgment are based, being paragraph 89 of section 1 of article V of said act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages" and the amendments thereof, as construed and enforced by said judgment of said supreme court of the State of Illinois, is contrary to the fifth amendment to the Constitution of the United States.

VIII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois whereon said proceedings and judgment are based, being paragraph 89 of section 1 of article V of said act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," and the amendments thereof, as construed and enforced by said judgment of said supreme court of the

State of Illinois, is contrary to the fourteenth amendment to the Constitution of the United States.

191 IX.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois entitled "An act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation affirmed by said judgment of the supreme court of the State of Illinois was entered, as construed and enforced by the said supreme court of Illinois in rendering its said judgment, are repugnant to the Constitution of the United States and the amendments thereto.

X.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois entitled "An act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation affirmed by said judgment of the supreme court of the State of Illinois was entered, as construed and enforced by the said supreme court of Illinois in rendering its said judgment, are contrary to the fifth amendment to the Constitution of the United States.

192 XI.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that said act of the legislature of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois entitled "An act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation affirmed by said judgment of the supreme court of the State of Illinois was entered, as construed and enforced by the supreme court of the State of Illinois in rendering its said judgment, are repugnant to the fourteenth amendment to the Constitution of the United States.

XII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that by said judgment the plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, was denied the same rights and protection under said act of the legisla-

ture of the State of Illinois entitled "An act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, as were allowed to the other defendants in said proceeding, contrary to the said fourteenth amendment to the Constitution of the United States.

XIII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that by said judgment the plaintiff
in error, The Chicago, Burlington & Quincy Railroad Com-
193 pany, was denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

XIV.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said judgment was otherwise contrary to the Constitution of the United States and the amendments thereto.

Wherefore the said plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, prays that the judgment of the said supreme court of Illinois be reversed.

JOHN J. HERRICK,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 15,622. Illinois supreme court. Term No., 402. The Chicago, Burlington and Quincy Railroad Company, plaintiff in error, *vs.* The City of Chicago. Filed July 5, 1894.

166-226

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,

166-226 No. 129.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

The Chicago, Burlington & Quincy Railroad Company,
Plaintiff in Error,
vs.
The City of Chicago,
Defendant in Error.

Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN J. HERRICK,
ATTORNEY FOR PLAINTIFF IN ERROR.

J. W. BLYTHE,
COUNSEL.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

ture of the State of Illinois entitled "An act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, as were allowed to the other defendants in said proceeding, contrary to the said fourteenth amendment to the Constitution of the United States.

XIII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that by said judgment the plaintiff in error, The Chicago, Burlington & Quincy Railroad Com-
193 pany, was denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

XIV.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that the said judgment was otherwise contrary to the Constitution of the United States and the amendments thereto.

Wherefore the said plaintiff in error, The Chicago, Burlington & Quincy Railroad Company, prays that the judgment of the said supreme court of Illinois be reversed.

JOHN J. HERRICK,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 15,622. Illinois supreme court. Term No., 402. The Chicago, Burlington and Quincy Railroad Company, plaintiff in error, *vs.* The City of Chicago. Filed July 5, 1894.

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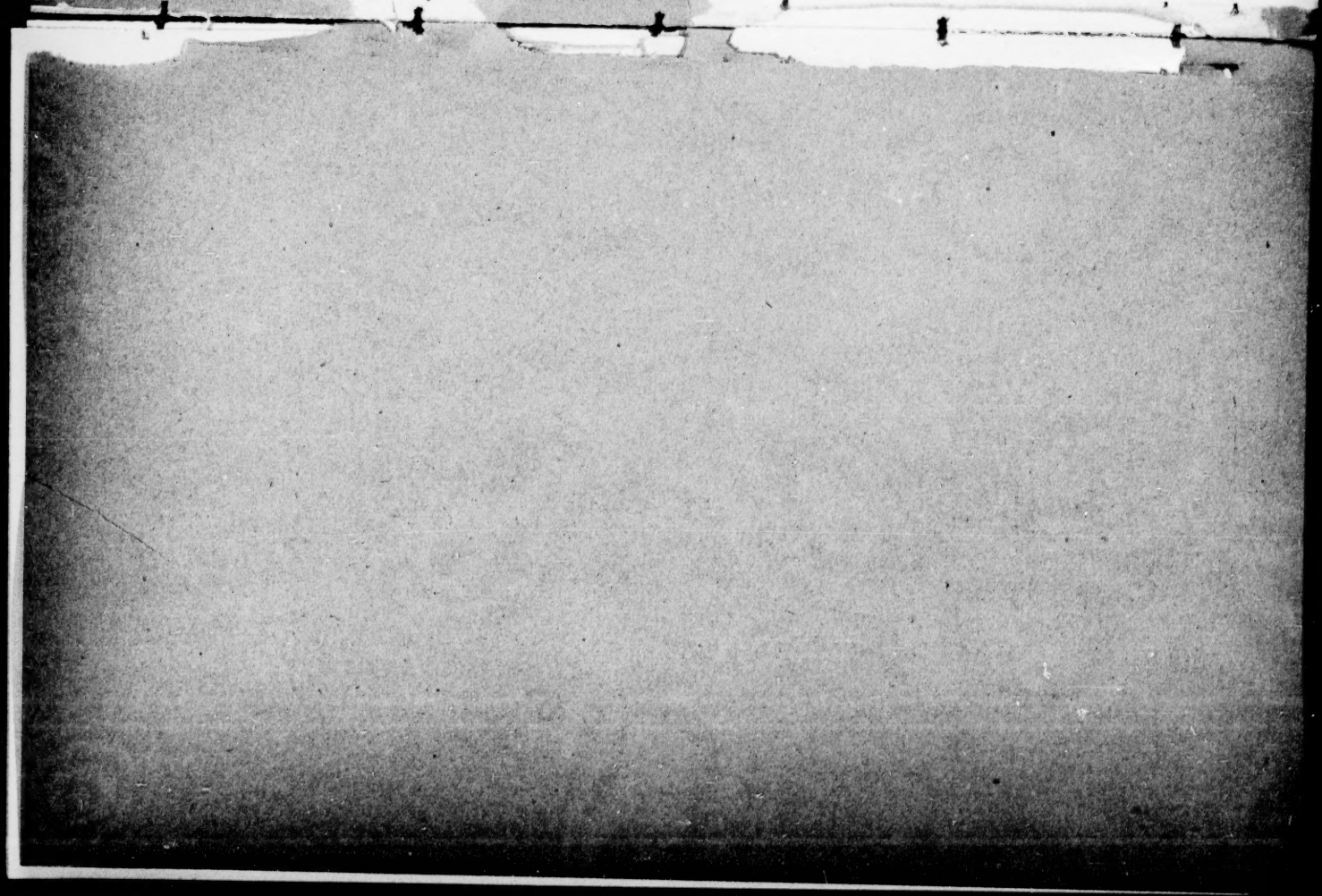

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

The Chicago, Burlington & Quincy Railroad Company,
Plaintiff in Error,
vs.
The City of Chicago,
Defendant in Error.

Error to the Supreme Court of Illinois.

STATEMENT OF FACTS.

This was a proceeding brought by the City of Chicago, the defendant in error, in the State Circuit Court, for the condemnation of a strip of land, owned by the plaintiff in error, for the use of a street to be opened under an ordinance of the city. The strip of land involved in the proceeding was 161 feet in length and 60 feet in width, and had a total area of 10,798 square feet. Under the rulings of the trial court, the proceeding resulted in a judgment by that court that just compensation to the plaintiff in error for the proposed appropriation of the land, subject to a right in the railroad company to a crossing over the street when opened, in the manner and subject to the same regulations as at other street crossings, was the nominal

sum of $1, and that, on payment of that sum, the city should have the right to take possession of the property for the purpose for which it was condemned. (Rec., 79; 74, 75.)

The property of plaintiff in error constituted about one-third of the entire property sought to be taken in the proceeding. The other two-thirds belonged to individual owners. (Rec., 74, 75.) For this property of the individual owners, not subject to any reserved right of crossing, the trial court adjudged, by the same judgment of condemnation, that the owners were entitled to the aggregate sum of $8,350 as just compensation, and that the city should only be entitled to take possession of the property on payment of that sum. (Rec., 79; 74, 75.)

On appeal to the Supreme Court of the state, this judgment was affirmed by that court. (Rec., 89-93.)

C., B. & Q. R. R. Co. v. *City*, 149 Ill., 457.

In the case next following this case on the present docket (No. 130), between the same parties, which by stipulation and order of court is to be heard with this case, there was a like proceeding for the condemnation of a strip of land, owned by the plaintiff in error, of the length of about 299 feet and a width of about eighty feet, and having a total area of 19,537 feet. Under like rulings of the trial court, there was the same judgment, condemning the property for the use of the proposed street and authorizing the city to take possession on like payment of the nominal sum of $1. (Rec., 87, 88; 84, 85.)

In this case, also, on appeal to the Supreme Court, the judgment was affirmed.

C., B. & Q. R. R. Co. v. *City*, 149 Ill., 464.

In the case of Chicago and North-Western Railway Company against the same defendant in error (No. 11 on the present docket), which, under the same stipulation and order, is also to be heard with this case, there was a similar proceeding for the condemnation, for the purpose of a street, of a strip of land owned by the plaintiff in error, 100 feet in length and sixty-six feet wide, and having an area of 6,600 square feet. In that case, the case was submitted to the court for trial without a jury, and in the same manner, under like rulings of the state court, the proceeding resulted in a like judgment for the condemnation of this strip of land, and authorizing the city to take possession of the property for the use of the proposed street on payment of the same nominal sum of $1. (Rec., .)

In this case, also, on appeal to the Supreme Court of the state, the judgment of the trial court was affirmed. *C. & N. W. Ry. Co.* v. *City*, 140 Ill., 309.

The case of *C. & N. W. Ry. Co.* v. *City*, (No. 11) was the first in order of time, and is reported in the reports of the state as *C. & N. W. Ry. Co.* v. *City of Chicago*, 140 Ill., 309. In the other two cases (Nos. 129 and 130), the trial court followed the ruling of the Supreme Court in its opinion affirming the judgment in *C. & N. W. Ry. Co.* v. *City of Chicago*, 140 Ill., 309, and these cases were affirmed by the Supreme Court mainly on the ground that its rulings in *C. & N. W. Ry. Co.* v. *City of Chicago* controlled the case. (149 Ill., 457, 464.)

In the following subsequent cases, the Supreme Court of Illinois affirmed like judgments condemning railroad property for the use of a street, subject to the right in

the railroad company to a crossing over the street with its tracks, on payment of the nominal sum of $1, on the express ground that, in so doing, it was following its previous decision in *C. & N. W. Ry. Co.* v. *City of Chicago*, 140 Ill., 309 (No. 11 in this court).

L. S. & M. S. Ry. Co. v. *City of Chicago*, 140 Ill., 510.

C. & N. W. Ry. Co. v. *Town of Cicero*, 155 Ill., 51.

C. & N. W. Ry. Co. v. *Town of Cicero*, 157 Ill., 48.

There have also been numerous other like judgments in the trial courts, in Illinois, of condemnation of railroad property, on payment of like nominal compensation, based on the ruling in *C. & N. W. Ry. Co.* v. *City of Chicago*, but which were not taken by appeal to the Supreme Court of the state, and do not, therefore, appear among the reported cases.

And by stipulation of the parties, a number of other like proceedings brought by the defendant in error, the City of Chicago, against the plaintiff in error, the Chicago, Burlington and Quincy Railroad Company, for the condemnation of other property owned by it for the purposes of a street, which are still pending, are to abide the result of the judgment in No. 129 in this court.

Under the practice in condemnation proceedings in the state court, the only pleading was the petition by the city. No answer or other pleading by the defendant is required. On the motion for a new trial in this case, (No. 129) and also in No. 130, which, under the practice of the state, was required to be in writing, the plaintiff in error assigned, as one of the grounds for granting the new trial,

that the rulings of the trial court were contrary to the Fourteenth Amendment of the Federal Constitution. (Rec., 78; see p. 91 of Rec., in No. 130.) And on appeal to the Supreme Court of the state it was assigned for error, that the several rulings of the trial court were contrary to the Fourteenth Amendment of the Constitution of the United States, and also that the judgment of the trial court deprived the plaintiff in error of its property without due process of law and the equal protection of the law, contrary to the Fourteenth Amendment. (Rec., 83; see, also, p. 91 of Rec., in No. 130.)

The three cases have been brought to this court by writ of error to review the judgments of the State Supreme Court.

The assignments of error in each case present the same general question, whether a judgment of a state court, which takes and appropriates to the public use of a street a tract of land, owned in fee simple by a railroad company, except the right to the company to cross the street when opened with its tracks, for the nominal compensation of $1, is contrary to the prohibition of the Fourteenth Amendment, that no state shall deprive a person of his property without due process of law.

Or, to state the question in another and more concrete form, the question is presented, whether a judgment of a state court which, by the very terms of the judgment of condemnation, appropriates the private property of a railroad company, admittedly owned by it in fee and admittedly of large value, for the public use of a street, reserving only to the company the same right of crossing the street, when opened, which it would have at any other street crossed by its tracks, *without any*

compensation in fact or law for such appropriation, is taking property by due process of law within the meaning of the Fourteenth Amendment.

They also present the further general question whether a judgment of a state court which awards to the individual owner of other property, taken by the same judgment, its full market value, and at the same time only awards to a railroad company for contiguous property, which is subject to the same substantial appropriation, except the reserved right to cross the street, when opened, with its tracks, only the nominal sum of $1 as compensation, is within the prohibition of the Fourteenth Amendment that no state shall deny to any person the equal protection of the laws.

The far reaching importance of these questions, as affecting not only the particular proceedings involved in the decision of the present cases, either directly or by the stipulation of the parties, but also as vitally affecting the title by which, not only the particular plaintiffs in error, but all the railroad companies of Illinois, hold their property, is apparent.

The particular facts of the different cases will be stated hereafter in connection with our discussion of the propositions, on which we rely for a reversal of the judgment.

ASSIGNMENT OF ERRORS.

1. That said Supreme Court of the State of Illinois erred in rendering its said judgment in this, that the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was and is thereby deprived of its property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

2. That the said Supreme Court of the State of Illinois erred in rendering its said judgment in this, that by the said judgment the property of the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was taken for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

3. That the said Supreme Court of the State of Illinois erred in rendering its said judgment in this, that the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was and is thereby deprived of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. That said Supreme Court of the State of Illinois erred in adjudging by its said judgment of affirmance of the judgment of condemnation in said cause that the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was only entitled to the nominal compensation of one dollar for its property taken and condemned by the said judgment of condemnation.

5. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that by the said judgment the plaintiff in error, The Chicago, Bur-

lington and Quincy Railroad Company, is denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois whereon said proceedings and judgment are based, being paragraph 89 of section 1 of Article V, of an act of the legislature of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, as construed and enforced by said judgment of said Supreme Court of the State of Illinois, is repugnant to the Constitution of the United States and the amendments thereto.

7. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois, whereon said proceedings and judgment are based, being paragraph 89 of section 1, of Article V of said act of the legislature of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," and the amendments thereof, as construed and enforced by said judgment of said Supreme Court of the State of Illinois, is contrary to the Fifth Amendment to the Constitution of the United States.

8. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the said statute of the State of Illinois whereon said proceedings and judgment are based, being paragraph 89 of section 1 of Article V of said act of the legislature of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," and the amendments thereof, as construed and enforced by said judgment of

said Supreme Court of the State of Illinois, is contrary to the Fourteenth Amendment to the Constitution of the United States.

9. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the said act of the legislature of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois, entitled "An Act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation, affirmed by said judgment of the Supreme Court of the State of Illinois, was entered, as construed and enforced by the said Supreme Court of Illinois in rendering its said judgment, are repugnant to the Constitution of the United States and the amendments thereto.

10. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the act of the legislature of the State of Illinois, entitled "An Act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois, entitled "An Act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation, affirmed by said judgment of the Supreme Court of the State of Illinois, was entered, as construed and enforced by the said Supreme Court of Illinois in rendering its said judgment, are contrary to the Fifth Amendment to the Constitution of the United States.

11. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that said act of the legislature of the State of Illinois, entitled "An

Act to provide for the incorporation of cities and villages," in force July 1, 1872, and the amendments thereof, and the said act of the legislature of the State of Illinois entitled, "An Act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, under which the judgment of condemnation, affirmed by said judgment of the Supreme Court of the State of Illinois, was entered, as construed and enforced by the Supreme Court of the State of Illinois in rendering its said judgment, are repugnant to the Fourteenth Amendment to the Constitution of the United States.

12. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that by said judgment the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was denied the same rights and protection under said act of the legislature of the State of Illinois, entitled, "An Act to provide for the exercise of eminent domain," in force July 1, 1872, and the amendments thereof, as were allowed to the other defendants in said proceeding contrary to the said Fourteenth Amendment to the Constitution of the United States.

13. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that by said judgment the plaintiff in error, The Chicago, Burlington and Quincy Railroad Company, was denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

14. That the said Supreme Court of the State of Illinois erred in rendering said judgment in this, that the said judgment was otherwise contrary to the Constitution of the United States and the amendments thereto.

POINTS AND AUTHORITIES.

I.

THAT THE PROHIBITIONS OF THE FOURTEENTH AMENDMENT EXTEND TO ANY ACTION OF A STATE THROUGH ITS CONSTITUTED AUTHORITIES, AND THEREFORE INCLUDE ANY TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW, OR ANY DENIAL OF EQUAL PROTECTION OF THE LAWS, BY THE STATE, WHETHER ACTING THROUGH ITS LEGISLATIVE, EXECUTIVE OR JUDICIAL DEPARTMENT.

Ex parte Virginia, 100 U. S., 339.
Neal v. *Delaware*, 103 U. S., 370.
Virginia v. *Rives*, 100 U. S., 313.
Yick Wo v. *Hopkins*, 118 U. S., 356.
Scott v. *McNeal*, 154 U. S., 34.
In re Wood, 140 U. S., 278.
Gibson v. *Mississippi*, 162 U. S., 579.
Bush v. *Kentucky*, 107 U. S., 110.
Robb v. *Connolly*, 111 U. S., 624, at 637.
Murray v. *Louisiana*, 163 U. S., at p. 105.
Bergeman v. *Backer*, 157 U. S., 655.

II.

THE TAKING BY A STATE OF PROPERTY FOR PUBLIC USE, WITHOUT COMPENSATION TO THE OWNER, IS NOT "DUE PROCESS OF LAW," WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

Hurtado v. *California*, 110 U. S., 516.
Hagar v. *Reclamation Dist.*, 111 U. S., 701.

Gardner v. *Newburgh*, 2 John Ch., 165.
Sinnickson v. *Johnson*, 17 N. J. L., 145.
Monongahela N. Co. v. *U. S.*, 148 U. S., 324.
Sweet v. *Rechel*, 159 U. S., 381.
Searle v. *School District*, 133 U. S., 553, at p. 553.
Petition of Mt. Washington Road, 35 N. H., p. 141.
Bristol v. *New Chester*, 3 N. H., pp. 534–535.
Ash v. *Cummings*, 50 N. H., pp. 612–3.
Johnston v. *Rankin*, 70 N. Car., 550.
Parham v. *The Justices*, 9 Geo., 348.
2 Story on Const. (5th Ed.), pp. 702–3, Sec. 1956.
1 Hare's Am. Const. Law, 347–8.
2 Dillon Mun. Corp. (4th Ed.), Sec. 586.
Scott v. *Toledo*, 36 Fed. Rep., 385.
Baker v. *Norwood*, 74 Fed. Rep., 997.
Henderson v. *Ry. Co.*, 21 Fed. Rep., at p. 365.
Mount Hope Cemetery Co. v. *Boston*, 158 Mass., at p. 519.
Harness v. *C. & O. C. Co.*, 1 Maryland Ch. Dec., 249.
Martin, Ex parte, 8 Eng. (Ar.), 199.

III.

THE JUDGMENT OF THE STATE COURT WAS A TAKING OF THE PROPERTY OF PLAINTIFF IN ERROR WITHOUT COMPENSATION, AND FOR THAT REASON, WITHOUT DUE PROCESS OF LAW.

In addition to the authorities cited under Points I and II, *supra*, we refer to the following authorities:

1. Nominal damages were not compensation, and the judgment was in legal effect the same as if it had provided for a taking without compensation.

C. W. D. Ry. Co., v. *W. S. E. R. R.*, 152, Ill., 519.

1 Sedgwick on Damages, Sec. 109, *n.* (*b.*) and other cases cited.

S. P. Comms. v. *Trustees*, 107 Ill. 491:

2. It is well settled in Illinois that, in condemnation proceedings in that state, the value of the land to be condemned is a fact to be affirmatively proved by the petitioner, and that, without proof of such value, it is not entitled to the judgment of condemnation.

In re McReynolds v. *B. & O. Ry. Co.*, 106 Ill., 157.

S. P. Comms. v. *Trustees*, 107 Ill., 491.

Neff v. *Cincinnati*, 32 Oh. St., 215, cited and approved in 106 Ill., 152, *supra*.

3. It is familiar law that a railroad company may sell or lease any of its surplus lands, like an individual, and that this power to sell surplus lands will be implied as incident to the right of ownership.

Aurora Agl. & Hort. Soc. v. *Paddock*, 80 Ill., 263, at 265.

Morawetz on Corp. Sec. 335, 368, 370.
Beach on Corporations, Sec. 357.
Hendee v. *Pinkerton*, 96 Mass., 386.
White Water Valley Co. v. *Vallette*, 21 How. (U. S.), 424.

IV.

IN REVIEWING THE JUDGMENT OF THE STATE COURT, THIS COURT WILL DETERMINE FOR ITSELF THE DIFFERENT QUESTIONS INVOLVED IN THE DETERMINATION OF THE QUESTION WHETHER THE JUDGMENT OF THE STATE COURT DEPRIVED THE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, OR DENIED IT THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Huntington v. *Attrill*, 146 U. S., 657, at pp. 694, 4, and cases cited.
M. & O. R. R. v. *Tennessee*, 153 U. S., 486, at pp. 492–5, and cases cited.
Scott v. *McNeal*, 154 U. S., 34.

V.

THE JUDGMENT OF THE STATE COURT DENIED TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

VI.

THE PARTICULAR RULINGS OF THE STATE COURT IN RENDERING THE JUDGMENT OF CONDEMNATION OF THE PROPERTY OF PLAINTIFF IN ERROR WITHOUT COMPENSATION.

The following additional authorities are cited and stated, *infra*, in the discussion of these rulings:

Village of Hyde Park v. *Washington Ice Co.*, 115 Ill., 233.

Keithsbury & Eastern R. R. Co. v. *Henry*, 79 Ill., 290.

Chicago & Evanston R. R. Co. v. *Dressel*, 110 Ill., 89.

L. S. & M. S. R. R. Co. v. *C. & W. I. R. R. Co.*, 100 Ill., 21.

Hayes v. *O., O. & F. V. R. R. Co.*, 54 Ill.. 376.

G. & S. W. R. R. Co. v. *Haslam*, 73 Ill., 494.

L. S. & M. S. Ry. Co. v. *W. I. R. R.*, 100 Ill., 33.

City v. *McDonough*, 112 Ill., 85.

T. & P. R. R. Co. v. *Unsilkel*, 22 Ill., 221.

Butte Co. v. *Boydston*, 64 Cal., 115.

Stone v. *Heath*, 135 Mass., 561.

Lewis on Eminent Domain, Sec. 498, and cases cited.

C. & A. R. R. Co. v. *L. & N. W. R. R. Co.*, 67 Ill., 147.

P. & P. U. Ry. Co. v. *P. & F. Ry.*, 105 Ill., 118.

C. & W. I. R. R. Co. v. *C. E. Ry. Co.*, 115 Ill., 383.

St. L. J. & C. R. R. v. *L. & N. W. R. R.*, 96 Ill., 274.

Old Colony & Fall River R. R. v. *Plymouth*, 14 Gray, 155.

Central R. R. Co. v. *Bayonne*, 51 N. J. Law, 428.

People v. *L. S. & M. S. R. R.*, 52 Mich., 277.

Grand Rapids v. *Grand Rapids & Indiana R. R. Co.*, 58 Mich., 641.

Chicago & Grand Trunk Ry. Co. v. *Hough*, 61 Mich., 507.

K. C. R. R. Co. v. *Commissioner*, 45 Kan., 716.

Kansas City v. *K. C. B. Ry. Co.*, 103 Mo., 633.

ARGUMENT.

I.

THE PROHIBITIONS OF THE FOURTEENTH AMENDMENT EXTEND TO ANY ACTION OF A STATE THROUGH ITS CONSTITUTED AUTHORITIES, AND THEREFORE INCLUDE ANY TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW, OR ANY DENIAL OF THE EQUAL PROTECTION OF THE LAWS, BY THE STATE, WHETHER ACTING THROUGH ITS LEGISLATIVE, EXECUTIVE OR JUDICIAL DEPARTMENT.

The following cases, decided by this court, expressly sustain the above proposition:

Ex parte Virginia, 100 U. S., 339.
Neal v. *Delaware*, 103 U. S., 370.
Virginia v. *Rives*, 100 U. S., 313.
Yick Wo v. *Hopkins*, 118 U. S., 356.
Scott v. *McNeal*, 154 U. S., 34.
In re Wood, 140 U. S., 278.
Gibson v. *Mississippi*, 162 U. S., 579.
Bush v. *Kentucky*, 107 U. S., 110.
Robb v. *Connolly*, 111 U. S., 624, at 637.
Murray v. *Louisiana*, 163 U. S., at p. 105.
Bergemann v. *Backer*, 157 U. S., 655.

The attention of the court is now called to the following of the above cases, the facts and reasoning of which we deem peculiarly pertinent to the case at bar, and therefore state and quote from them as part of this argument.

In *Ex parte Virginia*, 100 U. S., 339, *supra*, in discussing the provisions of the Fourteenth Amendment,

Mr. Justice STRONG, delivering the opinion of this court, said:

"The prohibitions of the Fourteenth Amendment are directed to the states, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, *whether that action be executive, legislative or judicial.* * * * It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a state cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. * * * We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are: 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States. * * * Nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, *by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.*"

And in the prior case of *Virginia* v. *Rives*, 100 U. S., at pp. 318, 319, this court had announced the same doctrine.

Then came the leading case of *Neal* v. *Delaware*, 103 U. S., 370, in which this court had occasion to apply the doctrine laid down in *Ex parte Virginia*, and *Virginia* v. *Rives*, *supra*, and to hold that the action of the State Court of Oyer and Terminer, before which Neal had been tried, was in conflict with the protection to which Neal was entitled under the Fourteenth Amendment, and on that ground, to reverse the judgment of conviction.

In that case, Neal, a person of color, was indicted for rape in the Court of Oyer and Terminer in Delaware. After his indictment and before his trial, he filed a petition to remove the case to the United States Circuit Court under the provisions of Sec. 641 of the revised statutes, providing for the removal of any civil suit or criminal prosecution, commenced in any state court, "against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state, where such suit or pending, any right secured to him by any law providing prosecution is for the equal civil rights of the citizens of the United States."

This petition set forth that at the same time of filing the same, citizens of the African race, or of color, otherwise qualified, were, by reason of the constitution and laws of the State of Delaware, excluded from service on both grand and petit juries, and that by the finding of the indictment by a grand jury, from which African citizens had been so excluded, the accused had been denied the equal protection of the laws, and that he would also, in the coming trial in the state court, be denied the equal protection of the laws, by the exclusion of such Africans from the petit jury. The court of Oyer and Terminer denied the petition to remove, for the reason that *no law of the state* forbade the Levy court to select Africans as jurymen, and that it did not appear that the grand and petit

juries, though in fact composed wholly of white men, were so made up because the names of colored men were not selected for jury service on account of their race and color.

Thereupon Neal, before arraignment, moved to quash the indictment, and the list and panel of grand jurors by whom it was found, on the ground that the Levy Court, in selecting grand jurors and petit jurors, excluded all colored persons because of their race and color, and that the prothonotary and clerk of the peace drew from the lists of those selected as grand jurors, the grand jurors by whom the indictment against him was found, and also drew, from the list of those selected to serve as petit jurors, the petit jurors by whom Neal was to be tried for his life, and that, from both the grand and petit jury, all persons qualified by law to serve as jurors who were persons of African race were excluded because of their race and color. It was then agreed between the attorney for the state and the attorney for Neal that the statements and allegations of the accused, in his petition for removal, should be taken and given the same effect, on the motion to quash, as if verified in a separate affidavit.

Thereupon the Court of Oyer and Terminer overruled the motion to quash, "*because*, although in fact no persons of African race and of color were upon either panel, no evidence had been produced or offered by him (Neal) to prove his statements and allegations in his petition and affidavit thereto, upon which the motion to quash was founded, that the exclusion by the Levy Court from the grand and petit juries of all persons of African race and color was because of their race and color, and that the court could not accept such fact of exclusion because of race and color to be established by the circumstance that no persons of African race or of color were in fact on the lists and panels of

grand jurors and petit jurors, or by his (Neal's) mere unaided affidavit, but the same should have been proven affirmatively on his part by competent testimony, outside of his own affidavit, before the motion could be granted."

Neal, thereupon, before arraignment or pleading to the indictment, made a motion to be allowed to produce witnesses to the statements in his petition and affidavit. The Court of Oyer and Terminer overruled this motion "on the ground that full time to produce the witnesses had existed before the motions were heard; that application for leave to summon witnesses to support a motion which had been argued and refused because of want of proof, when sufficient time had existed for its production, was without precedent in the Court of Oyer and Terminer of that state, and, therefore, the motion must be treated as coming too late to be granted."

Neal was then arraigned, pleaded, was found guilty, and the death sentence imposed, and a writ of error was then sued out to the judgment of the Court of Oyer and Terminer.

This court held that the denial of the petition to remove was not error, for the reason that the record did not show that any statute or law of Delaware authorized the discrimination complained of, and said:

"The discrimination complained of does not result from the constitution or laws of the state, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest *until after the action of the state court in the case commenced.* The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court under Sec. 641. *In thus construing the statute, we do not withhold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constitutional equality of civil rights, all opportunity of appealing to the courts of the Union for the redress of his wrongs. For, if not entitled under the statute to the removal of the suit or*

prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege or immunity, given or secured to him by the constitution or laws of the United States, bring the case here for review."

This court then proceeded to hold that the action of the Court of Oyer and Terminer, in overruling the motion to quash the indictment, denied Neal the equal protection of the laws, and that the judgment of conviction must be reversed.

This court said:

"We are of opinion that the motions to quash, sustained by the affidavit of the accused—which appears to have been filed in support of the motions, without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned—*should have been sustained*. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the state could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney general. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit 'in the consideration and decision' of the motions, implied, as we think, that the state was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice.

The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the state—although its colored population exceeded 20,000 in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United

States. It was, we think, under all the circumstances, a violent presumption *which the state court indulged*, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.

The action of those officers in the premises is to be deemed the act of the state, *and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.* Speaking by Mr. Justice Strong, in *Ex parte Virginia*, we said, and now repeat, that 'a *state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agent by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's authority, his act is that of the state. This must be, or the constitutional prohibition has no meaning.*'

The judgment of the Court of Oyer and Terminer will be reversed, *with directions to set aside the judgment and verdict, as well as the order denying the motion to quash the indictment and panels of jurors*, and for such proceedings, upon a further hearing of these motions, as may be consistent with the principles of this opinion."

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, one of the two cases there before this court, was a writ of error to the Supreme Court of California in a *habeas corpus* proceeding, brought by Yick Wo in that court to obtain his release from imprisonment for an alleged violation of an ordinance passed by the board of supervisors in San Francisco, which prohibited the carrying on of public

laundries within certain limits of the municipality. This court said:

"In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws or treaties of the United States. The question whether his imprisonment is illegal, under the constitution and laws of the state, is not open to us. * * *

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; *for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States*, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

This court then discussed the meaning of the ordinances, and then said (page 369 of the report):

"It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; *and in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances —an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.* * * * In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For *the cases present the ordinances in actual operation, and the facts shown establish an administration, directed so exclusively against a particular class of persons, as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by*

the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Chy Lung* v. *Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* v. *Delaware*, 103 U. S., 370; and *Soon Hing* v. *Crowley*, 113 U. S., 703.

The present cases, as shown by the facts disclosed in the record, are within this class. * * *

The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

In *Scott* v. *McNeal*, 154 U. S., 34, this court held that *a judgment* of the highest court of a state, by which the purchaser at an administrator's sale, under order of a probate court, of land of a living person, was held to be entitled to the land as against the latter, deprived him of his property without due process of law, contrary to the Fourteenth Amendment, and was reviewable by this court onwrit of error.

The facts in the case were as follows:

Scott brought ejectment against the defendants in the Superior Court in Washington. At the trial, it was con-

ceded that Scott owned the land until 1888. The defendants were then permitted by the trial court, against the objection of Scott, to to prove that in April, 1888, a judgment creditor of Scott presented a petition for the appointment of an administrator of Scott's estate, alleging that he had "mysteriously disappeared * * * more than seven years ago; that careful inquiry, made by relatives and friends * * * at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance," that "he was never married and left no last will," and that "he left real estate in his own right in this county of the value of $600, more or less," and setting forth that his heirs were three minor children of a deceased brother.

Notice of this petition was given by posting in three public places, as required by law, a notice, signed by the Probate judge, and stating that the judgment creditor "having filed in this court a petition for the appointment of R. H. Milroy, as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock A. M., at the office of the undersigned."

At the time thus appointed by this notice, the Probate Court, after appointing a guardian *ad litem* for the minors, and hearing evidence, entered an order, appointing Milroy administrator, on giving bond. This order recited that "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings, when last seen (about eight years ago), and the circumstances of that time and immediately and shortly afterwards,

were such as to give his relatives and acquaintances the belief that he was murdered, at about that time; and it appearing that he has estate in this county; now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian *ad litem* of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate," etc.

Afterwards, the Probate Court, on the petition of Milroy, the administrator, and after the usual notice, and with the consent of the guardian *ad litem*, entered an order, authorizing the administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land in controversy in the suit to one Ward, and this sale was subsequently confirmed by an order of the Probate Court, and the purchase money was applied by the administrator in payment of a debt of Scott, which had been secured by mortgage on the land. Subsequently, after the confirmation of the sale to Ward, Ward conveyed the property to the defendants, who took possession and made valuable improvements. The objections by Scott to this evidence were overruled by the trial court, it holding that "the Probate Court *having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead*, its proceedings were not absolutely void," and a verdict was thereupon entered for defendant.

Scott appealed to the Supreme Court of Washington, and there argued "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law," but that court held that the proceedings of the Probate Court were not void and affirmed the judgment.

Scott then sued out a writ of error, and contended in this court that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter and void, *and that the judgment of the trial court, and the judgment of the Supreme Court of Washington, affirming that judgment*, deprived him of his property without due process of law, and were contrary to the Fourteenth Amendment. And this contention was upheld by this court.

Mr. Justice GRAY, delivering the opinion of the court, said:

"The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were, that the equities of the case appeared to be with the defendants; that the court was 'inclined to follow' the case of *Roderigas* v. *East River Savings Institution*, 63 N. Y., 460; and that, *under the laws of the territory, the Probate Court, on an application for letters of administration, had authority to find the fact as to the death of the intestate*, the court saying: 'Our statutes only authorize administration of the estate of deceased persons, and, before granting letters of administration, *the court must be satisfied by proof* of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Section 1299 of the 1881 Code *gave the Probate Court exclusive original jurisdiction in such matters*, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court or in the exercise of its jurisdiction.'

Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. St., 309, 317, 318.

After giving to the opinion of the Supreme Court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.

The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive *or its judicial authorities. Virginia* v. *Rives*, 100 U. S., 313, 318, 319; *Ex parte Virginia*, 100 U. S., 339, 346; *Neal* v. *Delaware*, 103 U. S., 370, 397. And the first one, as said by Chief Justice WAITE in *United States* v. *Cruikshank*, 92 U. S., 542, 554, repeating the words of Mr. Justice JOHNSON in *Bank of Columbia* v. *Okely*, 4 Wheat., 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of the statute of a territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state.

In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S., 657, 683, 684; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S., 486, 492-495."

In the case of *In re Wood*, 140 U. S., 278 (1891), Wood, a person of color, being in the custody of the warden of Sing Sing prison, filed a petition for a writ of *habeas corpus*, in the Circuit Court of the United States, setting up that the indictment upon which he had been arraigned, had been found by a certain grand jury, that he was

convicted by a certain petit jury, and that his trial and conviction were in violation of his rights under the constitution and laws of the United States, for the reason "that from the panels and lists of jurors whence said grand jury and petit jury were drawn, and from said juries, all persons of African race and descent, and black in color, were excluded."

The petition, after setting out this discrimination against the petitioner, alleged that, on the petitioner's arraignment, he was without counsel or means of procuring counsel, and was required to, and did, plead to the indictment in ignorance of his rights; that, on the trial, he was ignorant of the above facts "without his fault, and was, therefore, unable to challenge or otherwise object to the lists, panels and array of grand and petit jurors for the ground aforesaid"; that, as stated in the report:

"After conviction, learning the facts in relation to such exclusion of persons of his race from the list of grand and petit jurors, he moved, with due diligence, upon allegation and tender of proof of the facts aforesaid, for a new trial; that according to the law and practice of the court, his motion should have been entertained and decided upon its merits, and, upon due proof, should have been granted, but the court refused altogether to entertain it, or to pass upon his said contention upon proofs tendered, and a time was thereupon fixed for his execution; that by reason of such facts, 'he has been deprived of all the privilegs and just rights of citizens of the United States, and of the equal protection of the laws, and is, in like manner, deprived of his liberty, and about to be deprived of his life, without due process of law,' and that his commitment and detention, under said conviction and sentence, are void."

The petition for *habeas corpus* also showed that there was a further motion, at the same time, by Wood, for the issue of subpœnas for witnesses to be examined in sup-

port of the motion, and that this motion for subpœnas was supported by another affidavit by Wood.

Such was the case presented by the petition for *habeas corpus*.

While this court held that the case was not one in which a *habeas corpus* should issue, for the reason that the discrimination complained of was not authorized by the New York statutes, it expressly recognized, in distinguishing the case from *Neal* v. *Delaware* and other cases, *supra*, that *the denial by the state trial court of Wood's motions* was a denial of his rights under the Fourteenth Amendment, which could have been brought before it for review on writ of error to the highest court of New York.

This court said:

"But it is contended that the present case is brought within former decisions of this court by reason of the alleged exclusion, in fact, from the lists of grand and petit jurors, of citizens of the African race, because of their race and color. The decision upon which the appellant particularly relies in support of his application for the writ of *habeas corpus* is *Neal* v. *Delaware*, 103 U. S., 370, 394, *which, it must be observed, came here from the highest court of the state upon writ of error.* In that case, this court—after remarking that a denial, by officers of the state, charged with the duty of setecting jurors, of the right of the accused to a lelection of grand and petit jurors without discrimination sgainst his race, because of their race, would be a violaaion of the constitution and laws of the United States, which the trial court was bound to redress—observed: 'As said by us in *Virginia* v. *Rives*, 100 U. S., 313, the court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' *and ultimately in this court upon review. We repeat what was said in that case* * * *

We do not perceive that anything said in *Neal* v. *Delaware* would have authorized the Circuit Court to discharge the appellant from custody, even if, upon investigation, it had found that citizens of the race to which he belongs had been, in fact and because of their race, excluded from the lists of grand and petit jurors, from which were selected the grand jurors who indicted and the petit jurors who tried him. *That was a matter arising in the course of the proceedings against the appellant, and during his trial, and not from the statutes of New York, and should have been brought at the appropriate time, and in some proper mode to the attention of the trial court.* * * * *The statute* under which the appellant was prosecuted is not repugnant to the Constitution of the United States, and the court that tried him, we repeat, was competent to guard and enforce every right secured to him by that instrument, and which might be involved in his trial. The petition for the writ sets forth no ground *affecting its jurisdiction* either of the offense charged or of the person alleged to have committed it. If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of General Sessions, *and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. Savin, Petitioner*, 131 U. S., 267, 279; *Stevens* v. *Fuller*, 136 U. S., 468, 478. *Nor would that error*, of itself, have authorized the Circuit Court of the United States, upon writ of *habeas corpus*, to review the decision, or disturb the custody of the accused by the state authorities. *The remedy in such case, for the accused, was to sue out a writ of error from this court to the highest court of the state, having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws of the United States, could have been re-examined and reversed, affirmed or modified by this court as the law required.* Rev. Stat., Sec. 709."

In *Gibson* v. *Mississippi*, 162 U. S., 579 (April, 1896), a case quite similar in its facts to *Neal* v. *Dele-*

ware, 103 U. S., *supra*, but in which the accused had not moved to quash the indictment, but had merely petitioned for a removal to the United States Circuit Court, under Sec. 641 of the Revised Statutes, this court in holding, on the authority of *Neal* v. *Delaware*, and similar cases, that the removal was properly refused, reviewed all its former decisions, and said:

"Those cases were held to have also decided that the Fourteenth Amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, *it did not embrace a case in which a right is denied by judical action* during a trial, or in the sentence, or in the mode of executing the sentence; that *for such denials, arising from judical action after a trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, claimed under the Constitution or laws of the United States, are withheld or violated.* * * *

The equal protection of the laws is a right now secured to every person without regard to race, color or previous condition of servitude; and the denial of such protection by any state is forbidden by the supreme law of the land.

These principles are earnestly invoked by counsel for the accused. But they do not support the application for the removal of this case from the state court in which the indictment was found, *for the reason that neither the constitution of Mississippi, nor the statutes of that state, prescribed any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens* of the United States and to all persons within the jurisdiction of the state, without regard to race, color or previous condition of servitude.

Nor would we be justified in saying that the constitution and laws of the state *had, at the time this prosecution was instituted, been so interpreted by the Supreme Court of Mississippi as to show, in advance of a trial*, that persons of the race to which the defend-

ant belongs could not enforce in the judicial tribunals of the state the rights belonging to them in common with their fellow citizens of the white race. *If such had been the case, it might well be held that the denial of the equal protection of the laws arose primarily from the constitution and laws of the state.* * * *

We may repeat here what was said in *Neal* v. *Delaware*. * * * * If any right, privilege or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied *by a refusal of the state court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial*, his remedy would have been through the revisory power of the highest court of the state, *and ultimately through that of this court.* See also *In re Wood*, 140 U. S., 278, 284."

The same principles were affirmed by this court in

Murray v. *Louisiana*, 163 U. S., *supra*, at p. 105.

Bergemann v. *Becker*, 157 U. S., 655, *supra.*

See, also, to same effect,

Bush v. *Kentucky*, 107 U. S., 110.

Robb v. *Connolly*, 111 U. S., 624, at 637.

II.

THE TAKING, BY A STATE, OF PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION TO THE OWNER IS NOT "DUE PROCESS OF LAW," WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

In *Hurtado* v. *California*, 110 U. S., 516, this court, referring to the phrase "due process of law" in the Fourteenth Amendment,, said:

"It refers to that law of the land in each state, which derives its authority from the inherent and reserved powers

of the state, *exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. * * * Law is something more than mere will, exerted as an act of power.* It must be, not a special rule for a particular person or a particular case, but in the language of Mr. Webster in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and *thus excluding, as not due process of law*, acts of attainder, bills of pains and penalties, *acts of confiscation*, acts reversing judgments, *and acts directly transferring one man's estate to another*, legislative judgments and decrees *and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude."

In *Hagar* v. *Reclamation District*, 111 U. S., 701, this court, referring to the due process clause in the Fourteenth Amendment, said:

"The clause in question means, therefore, that there can be no proceeding against life, liberty or property, which may result in the deprivation of either, *without the observance of those special rules established in our system of jurisprudence for the security of private rights*," citing *Hurtado* v. *California*, 110 U. S., 516, 536, *supra*.

A taking of property for a public use without compensation to the owner is an arbitrary and despotic act; it is an arbitrary confiscation of property. *The right* to compensation is an incident of *the power* to take the property for public use; the one is inseparably connected with the other. The making of compensation is an inherent, necessary qualification and limitation of the governmental right

to take, "adopted," to use Chancellor KENT's language in *Gardner* v. *Newburgh*, 2 John. Ch., 165, cited *infra*, "by all temperate and civilized governments from a deep and universal sense of its justice."

In the leading case of *Gardner* v. *Newburgh*, 2 John. Ch., 165-6, a case where no constitutional provision required payment of compensation for property taken for a public use, Chancellor KENT said:

"I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes. * * * But to render the exercise of the power valid, *a fair compensation must, in all cases, be previously made* to the individuals affected, under some equitable assessment, to be provided by law. *This is a necessary qualification, accompanying the exercise of legislative power in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.* Grotius (De Jur. B. & P., b. 8, ch. 14, s. 7), Puffendorf (De Jur. Nat. *et* Gent., b. 8, ch. 5, s. 7), and Bynkerschoeck (Quest. Jur. Pub., b. 2, ch. 15), when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; *but they all lay it down, as a clear principle of natural equity, that the individual whose property is thus sacrificed must be indemnified.* * * * The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? 'Not,' says Blackstone (Com., Vol. 1, p. 139), 'by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is

to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' "

In *Sinnickson* v. *Johnson*, 17 N. J. L., at p. 145, the court, in holding that, even in the absence of a constitutional provision requiring the payment of compensation for property taken for a public use, such compensation must be made, said:

"*This power to take private property reaches back of all constitutional provisions;* and it seems to have been considered *a settled principle of universal law, that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.* (Puffendorf, b. 8, Ch. 5, p. 222; 2 Montesquieu, Ch. 15, p. 200; Vattel, 112, 113; 1 Black. C. 139; 2 Kent, C. 339, 340; 2 J. C. C., 168; 1 Peter's Com. R., 99, 111; 3 Story's Com. on Constitution, 661; *Bonaparte* v. *Camden and Amboy Rail Road Company*, Bald. R., 220. The language of Judge Baldwin in the case last cited is: '*The obligation*' (to make compensation) '*attaches to the exercise of the power*' (to take the property), 'though it is not provided for by the state constitution, or that of the United States had not enjoined it.' And Story calls the provision on this subject in the Constitution of the United States merely 'an affirmance of a great doctrine, established by the common law.' This principle of public law has been made, by express enactment, a part of the Constitution of the United States (*vid.*, fifth amendment); but it has been decided that, as a *constitutional* provision, it does not apply to the several states. (*Barron* v. *Mayor of Baltimore*, 7 Peters, 247; *Livingston's Lessee* v. *Moore*, 7 Peters, 551, 2.) *Still, if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this state can no more take private property for public use without just compensation than if this restraining prin-*

ciple were incorporated into and made part of its state constitution."

The doctrine so laid down in *Gardner* v. *Newburgh*, 2 John. Ch., 165, *supra*, and *Sinnickson* v. *Johnson*, 17 N. J. L., 129, *supra*, was expressly approved by this court in *Monongahela N. Co.* v. *U. S.*, 148 U. S., 324.

Mr. Justice BREWER, delivering the opinion of the court, there said:

"In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions, and it seems to have been considered a settled principle of universal law that *the right to compensation is an incident to the exercise of that power;* that the one is so inseparably connected with the other, that they may be said to exist, not as separate and distinct principles, but *as parts of one and the same principle.*' And in *Gardner* v. *Newburgh*, 2 Johns. Ch., 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, *a full and just equivalent shall be returned to him.*"

(See, also, *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 178, in which *Sinnickson* v. *Johnson*, *supra*, and *Gardner* v. *Newburgh*, *supra*, are cited and quoted with approval, Mr. Justice MILLER delivering the opinion of the court).

In *Sweet* v. *Rechel*, 159 U. S., 381, this court, Mr. Justice HARLAN delivering the opinion, said:

"When, however, the legislature provides for the actual

taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. *But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner.*"

In *Searle* v. *School District*, 133 U. S., 553, at p. 562, Chief Justice FULLER, delivering the opinion of this court, said:

"That right (of eminent domain) is the offspring of political necessity, and is inseparable from sovereignity, unless denied to it by its fundamental law. *It cannot be exercised, except upon condition that just compensation shall be made to the owner.*"

In *Bristol* v. *New Chester*, 3 N. H., at pp. 534 and 535, the court said:

"The power of the legislature to take the property of individuals for public purposes, is indisputable. It is a power limited, undoubtedly, in its nature by the public exigencies; but it is a power recognized by the constitution. There is no doubt, that when this power is exercised, a just compensation is to be made. The constitutions of some of the states expressly declare that such compensation shall be made. *And natural justice speaks on this point, where our constitution is silent.* We admit, that the legislature cannot arbitrarily take the property of one town, and give it to another."

(See, also, the later cases of *Petition of Mt. Washington Road*, 35 N. H., 141, and *Ash* v. *Cummings*, 50 N. H., at pp. 612–613, where the same doctrine is laid down.)

In *Johnston* v. *Rankin*, 70 N. Car., 550, the court said:

"Notwithstanding there is no clause in the constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Consti-

tution of the United States applies only to acts by the United States, and not to the government of the state, *State* v. *Newsom*, 5 Ired., 50, *yet the principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina. Davis* v. *Raleigh & Gaston Railroad Co.*, 2 D. & B., 451; *State* v. *Glenn*, 7 Jones, 321; *Cornelius* v. *Glenn*, 7 Jones, 512."

See, also, laying down the same doctrine,

1 Hare's Am. Const. Law, pp. 347–8.

Parham v. *The Justices*, 9 Geo., 348.

Martin et al., *Ex parte*, 8 Eng. (Ark.), 199, at p. 206.

Harness v. *C. & O. C. Co.*, 1 Maryland Ch. Dec., 249.

And in the following authorities, it is expressly held, that a law or proceeding which takes property for a public use without compensation is not "due process of law," within the meaning of the Fourteenth Amendment.

2 Story on Const. (5th Ed.), pp. 702-3, Sec. 1956.

1 Hare's Am. Const. Law, pp. 347-8.

2 Dillon Mun. Corp. (4th Ed.), sec. 586.

Scott v. *Toledo*, 36 Fed. Rep., 385.

Baker v. *Norwood*, 74 Fed. Rep., 997.

Henderson v. *Ry. Co.*, 21 Fed. Rep., at p. 365.

Mount Hope Cemetery Co. v. *Boston*, 158 Mass., 509, at 519.

Judge COOLEY, in his discussion of the provisions of the Fourteenth Amendment, in Chap. XLVII of the 5th edition of Story on the Constitution, says: (2 Story on the Constitution, (5th ed.) p. 676, at pp. 702–703, sec. 1956):

"Every species of individual property is also subject to be appropriated for the special needs of either the state or national government, whenever any particular parcel thereof is demanded for any public object. Here, again, the power to appropriate is subject to certain restrictions; it must not be exercised without making due compensation for whatever is taken; no more must be appropriated than is necessary; and if compensation is not agreed upon, it must be assessed by some impartial tribunal, and cannot be arbitrarily fixed by state authority. And in this, as well as all other cases in which the owner may be deprived of his property by proceedings *in invitum*, the law authorizing such proceedings must be complied with in all its essential requirements, or the proceedings will be ineffectual. (Citing, *Williams* v. *Peyton*, 4 Wheat., 77; *Thatcher* v. *Powell*, 6 Wheat., 119; *Beaty* v. *Knowler*, 4 Pet., 168; *Early* v. *Doe*, 16 How., 610; *Rule* v. *Parker*, 1 Cooke, 365; *Parker* v. *Overman*, 18 How., 137.) Due process of law requires, *first*, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and *secondly*, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them. (Citing, 1 Redfield on Railw., 239–241; Cooley, Const. Lim. Ch., 15; Potter's Dwarris on Statutes, Ch. 11.) The propriety of these rules is too obvious to require any discussion or elucidation."

In 1 Hare's American Const. Law, pp. 347, 348, Mr. Hare says:

"Agreeably to the fifth amendment, property cannot be taken by the United States for public use without compensation; and a similar provision may be found in the constitutions of the several states, while 'damaged, or destroyed' have recently been conjoined in some of the states with 'taken.' This clause, like the analogous language of the *habeas corpus* clause, may be regarded as a regulation of an inherent power, or as impliedly conferr-

ing a power that would not otherwise exist. (Citing *Taylor* v. *Porter*, 4 Hill, 143; *The West River Bridge Co.* v. *Dix*, 6 Howard, 507; *Sinnickson* v. *Johnson*, 2 Harrison, 129; *Gardner* v. *Newburgh*, 2 Johnson's Ch., 162.)

Whichever interpretation is adopted, it would seem obvious that the right of eminent domain could hardly be exercised without compensation in the face of the language of the same amendment, drawn from Magna Charta, that no person shall be deprived of life, liberty, or property without due process of law, which, though originally intended to check the arbitrary power of the crown, is a salutary restraint on all branches of our government. (Citing *Palairet's Appeal*, 67 Pa. St., 480.) *Like provisions exist in the state constitutions, and their observance is now guaranteed by the Fourteenth Amendment of the Constitution of the United States.*

We may therefore believe that compensation is a correlative, without which the right to take property for public use would be tantamount to confiscation, and would consequently be due, if there were no constitutional guaranties. (Citing *Gardner* v. *Newburgh*, 2 Johnson Ch., 162; *Sinnickson* v. *Johnson*, 2 Harrison, 129; *The West River Bridge Co.* v. *Dix*, 6 Howard, 540; *Fletcher* v. *Peck*, 6 Cranch, 145; *Pumpelly* v. *The Green Bay Co.*, 13 Wallace, 177; *Raleigh & Gaston R. R. Co.* v. *Davis*, 2 Dev. & Bat., 451; *Hatch* v. *Vermont Central R. R. Co.*, 25 Vt., 49, 66.) For as eminent domain is, as we have seen, simply a right to compel the citizen to sell at a price ascertained according to some just method of computation, the obligation of the government to pay is not less clear than that of the owner to surrender. (Citing *Gardner* v. *Newburgh*, 2 John, Ch., 162, 166, and 1 Blackstone's Comm., 139.) Compensation has accordingly gone hand in hand with the right of taking property for public purposes in all civilized countries, and been regarded as essential to its legitimate exercise, even under despotic rule."

In *Scott* v. *Toledo*, 36 Fed. Rep., 385, Mr. Justice JACKSON, sitting on the Circuit bench, held that if the Ohio statute, there under consideration, authorized the

taking of property for a public highway without compensation, was be void under the Fourteenth Amendment, as not due process of law. As Judge JACKSON'S opinion in this case contains a full discussion of this subject, and a statement of the authorities, we shall quote from it at length.

The learned judge said:

"It is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that 'due process of law' without which the citizen cannot be lawfully deprived of his property. For the defendant, it is claimed that 'the Fourteenth Amendment does not prohibit the taking of private property by a state without compensation'; in other words, that the appropriation of private property for public use, without compensation to the owner, is not depriving him of his property 'without due process of law.' * * * The single question is, therefore, presented, whether, in the taking of private property for public use, 'due process of law' *requires that compensation shall be made to the owner for the property so appropriated.* In other words, may a state or any subordinate division thereof, since the adoption of the Fourteenth Amendment to the Constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this Fourteenth Amendment, be deprived of his property by the state, *involve, as a necessary and essential ingredient, the payment or the making of compensation for private property appropriated to public use?* This precise question has not yet been passed upon, either by the Supreme Court of the United States or the state courts, so far as we have been able to discover, and it must, therefore, be considered and determined upon the general principles applicable to the subject.

No attempt will be made to define the exact scope of the terms 'due process of law.' No court has yet succeeded in giving to these words an exact definition, applicable to all the varied cases in which they may be in-

volved. The Supreme Court has said (*Davidson* v. *New Orleans*, 96 U. S., 104) that instead of attempting to define what constituted 'due process of law,' it was wiser, in ascertaining the intent and application of such an important phrase in the Federal Constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning.

In a general sense, 'due process of law,' is identical in meaning with the phrase, 'law of the land,' as used in the constitutions of the several states. Cooley Const. Lim., 432. As applied to the appropriation of private property for public uses under the power of eminent domain, 'due process of law' clearly does not mean *mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights.* Thus, in Cooley Const. Lim., 433, it is said:

'That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense.'

And, again (at p. 435):

'The principles, then, upon which the process is based, are to determine whether it is due process or not, *and not any considerations of mere form.* * * * When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, *we are to tests its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely.* * * * 'Due process of law,' in each particular case, means such an exertion of the powers of government *as settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.*'

To the same effect is the language of the Supreme Court in *Davidson* v. *New Orleans*, 96 U. S., 102. * * *

In this case of *Davidson* v. *New Orleans*, 96 U. S., 107, Mr. Justice BRADLEY said:

'If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * * I think it would be depriving a man of his property without due process of law.' * * *

In the *Kentucky Railroad Tax Cases*, 115 U. S., 331, 6 Sup. Ct. Rep., 57, this language of Mr. Justice BRADLEY is quoted with approval by the Supreme Court. It is a fundamental principle of the common law, established and well settled before the adoption of the Federal Constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, *and* that the owner must be compensated therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:

'So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and, indeed, frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; *but by giving him a full indemnification and equivalent for the injury thereby sustained.* The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner *to alienate his possessions for a reasonable price*, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' (Cooley, Bl. bk. 1, p. 137.) * * *

So, too, in Mills, Em. Dom. Sec. 1, it is said on this subject:

'The annals of all nations enjoying a constitutional government and of many despotic nations, show that the moral sense of mankind *requires such compensation.* In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental *that laws, not recognizing the right of the subject to compensation, would be void.*'

These well-recognized principles, vital to the security, and essential to the protection of the citizen against the arbitrary exercise of power on the part of the government were in full force at the adoption of the Constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted.

The Fifth Amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government.

This amendment to the Constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation upon the Federal power. The first ten amendments to the Constitution recognized and secured to all citizens certain rights, privileges and immunities essential to their security. The Fifth Amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states, in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. *The Fourteenth Amendment was adopted to remedy and correct this defect in the supreme organic law of the land.* It involves no forced or unreasonable construction to hold that this Fourteenth Amendment, as applied to the appropriation

of private property for public uses, *was clearly intended to place the same limitation upon the power of the states which the Fifth Amendment had placed upon the authority of the Federal government.* * * *

Whatever may have been the power of the states on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power, in dealing with individual rights, that the states cannot now lawfully appropriate private property for the public benefit or to public uses *without compensation to the owner*, and that *any attempt so to do*, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly by taking the property of one person and vesting it in another or the public, *or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled*, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment, *compensation for private property taken for public uses constitutes an essential element in 'due process of law,'* and that without such compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of the federal constitution."

In *Baker* v. *Village of Norwood*, 74 Fed. Rep., 977, (June, 1896), Judge SAGE, after discussing a certain proceeding for taking land for a public highway, came to the conclusion that it was a taking for a public use without compensation, and then proceeded to hold that such taking without compensation was not "due process of law," and was prohibited by the Fourteenth Amendment.

The learned judge said:

"If such a proceeding is not a taking for public use without compensation, I am at a loss to know what would constitute such a taking. In *Davidson* v. *New Orleans*, 96 U. S., 107, Mr. Justice BRADLEY said: 'If a state, by its laws, authorized private property to be taken for public use, without compensation, I think it would be depriving a man of his property without due process of law.' The same question was considered in *Kentucky Railroad Tax Cases*, 115 U. S., 331, 6 Sup. Ct., 57, and this language of Mr. Justice Bradley was quoted with approval. Under the Ohio constitution, where private property is taken for public use, compensation therefor must first be made in money, or first secured by a deposit of money, and the compensation must be assessed by a jury without deduction for benefits to any property of the owners. This whole subject was considered by Judge Jackson in *Scott* v. *City of Toledo*, 36 Fed., 385. He held that such proceedings as are complained of in this bill were in violation of the provision of the Fourteenth Amendment of the Constitution of the United States, that no state shall deprive any person of life, liberty or property, without due process of law. The equity of this case is with the complainant, and a perpetual injunction will be decreed against the defendants, as prayed for."

In *Mount Hope Cemetery* v. *Boston*, 158 Mass., 509, *supra*, at page 519 (1893), the Supreme Court of Massachusetts held that a statute, which required the City of Boston, without compensation, to transfer certain cemetery property it owned to a public cemetery company, was in conflict with the provisions of the Fourteenth Amendment.

The court said:

"The conclusion to which we have come is, that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts *and of the United States, so that the legislature has no*

power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment."

In *Henderson* v. *Ry. Co.*, 21 Fed. Rep., *supra*, at p. 365, Judge BARR said:

"If there is an existing right of way over this route, belonging either to the Louisville City Railway, its stockholders or the mortgagee of the Citizens' Passenger Railway Company, it is property which should be protected, *and cannot be taken except by due process of law. A legislative enactment, giving this right of way to the Central Passenger Railway Company, if it is the property of the Louisville City Railway Company, is not due process of law.*"

It was also held in the following authorities:

Harness v. *C. & O. C. Co.*, 1 Maryland Ch. Dec., 249,

Martin et al., Ex parte, 8 Eng. (Ark.), 199,

that to take property for public use, without compensation, is in contravention of a constitutional provision that no person shall be deprived of his property but "by the law of the land," which, as held by this and other courts, is the equivalent of the provision in the Fourteenth Amendment that no person shall be deprived of his property "without due process of law."

In *Harness* v. *C. & O. C. Co.*, 1 Maryland Ch. Dec., 249, *supra*, after holding that, even in the absence of constitutional restrictions, property cannot be taken for a public use without compensation, the court said:

"But, if it should be conceded that the legislature of Maryland might exercise the power in question, if there was nothing in the constitution to forbid it, and if the argument pressed by one of the counsel for the defendants is sound, that the law-making power of the state governments is unrestrained, except by the constitution; still, as it seems to me, the appropriation, by law, of

private property to the public use, without compensating the owner, could not be tolerated.

The sixth article of the bill of rights separates the legislative, executive and judicial departments of the government, and makes the separation permanent. And the 21st article of the same instrument, says 'that no freeman ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, *or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.*'

These provisions were, undeniably, intended as restraints upon the legislative power, by means of the courts of justice, charged with the administration of the law. The words 'by the law of the land,' which are copied from Magna Charta, are understood to mean, due process of law, that is, a regular trial according to the course and usage of the common law."

III.

THE JUDGMENT OF THE STATE COURT WAS A TAKING OF THE PROPERTY OF PLAINTIFF IN ERROR WITHOUT COMPENSATION, AND FOR THAT REASON WITHOUT DUE PROCESS OF LAW.

The authorities cited, *supra*, establish certain indisputable propositions.

They establish that the prohibitions of the Fourteenth Amendment extend equally to each branch of the state government—the executive, legislative *and the judicial*, and it follows that any *judgment of a court*, which operates to take private property without due process of law within the meaning of the amendment, or denies to any person the equal protection of the law, is as much within the prohibition as if the property was taken or the right denied by an act of the legislature.

They also establish that the due process of law, referred to in the Fourteenth Amendment, includes, as an essential element, that, in the act of taking private property, there must be compensation to the owner.

It follows that, if by the judgment of a state court private property is taken without compensation, and that judgment is brought to this court by writ of error, it is as much open to review by this court as would be like action by the legislature or executive.

Let us now recur to the undisputed facts as to the property appropriated by the judgment in question.

Under the undisputed facts, at the time these proceedings were instituted, plaintiff in error was the owner in fee simple of the strip of land proposed to be condemned for use for a public street. (Rec., 43-52.) By virtue of this title, it had the right, as long as its ownership continued, to use the particular land for any lawful purpose for which it could lawfully use any lands owned by it.

As the necessary and immediate effect of the judgment of condemnation, plaintiff in error, and in case of a conveyance of any part of the land, its grantees, will necessarily be limited in their use of the property to such uses as will be consistent with its continuous use by the public as a street. The absolute right of user vested in it, or those to whom it may convey any part of it, will, therefore, be reduced to a limited right of user *for railroad purposes only*, and, as a consequence, the land will be unavailable either for use or sale for any other purpose. And even in the view held by the Supreme Court of Illinois that its use of the land is limited to railroad purposes, plaintiff in error will be prevented from making it available for the variety of other

railroad purposes, for which it is shown by the evidence it would otherwise be available, such as a station house, offices, coal chutes, elevator offices, etc. (Rec., 55–7), and will be limited in its use *to the single purpose of railroad tracks.* And even for the use for railroad tracks, it will manifestly be only available for use in connection with and as part of its railroad. As an isolated and separate tract, it will be wholly unavailable, and will, therefore, have no value to a third person even for this limited purpose.

The necessary effect, therefore, of the condemnation of the right to use this strip in perpetuity for the purposes of a street will be to practically destroy its entire saleable value and to limit its future use even by appellant to the *single purpose of railroad tracks.*

Not only this but the necessary effect will be to limit its use by appellant, even for the particular purpose, to such use *as will be consistent with its continuous use as a public street*, and thus prevent its use even in the manner and to the extent to which it has been heretofore used.

It appears in evidence that, heretofore, the "Y" track and the switch track (which are the only tracks on the south eighty-one feet of the strip) have been used for storage purposes, that is, holding cars for which the company has no immediate use; that the cars have been stored on the side-track on an average of two days at a time; and that the "Y" track had also been used for the same purpose during the day, the cars thus stored frequently standing there from morning until evening; and that, as business had been handled by appellant, there are cars standing on these tracks at all times. One of the main tracks is also used from day to day for the same purpose of storing cars. In addition to this, there is a

large vacant space as yet unoccupied, on which other tracks might be laid for similar storage purposes. (Rec., 52–6.) *This use will necessarily be entirely destroyed by the opening of the street.*

It is clear, from these undisputed facts, that a large part (in fact, the principal part) of the value of this strip of land is destroyed by the judgment of condemnation entered by the court below.

In fact, the only practical right left to plaintiff in error is the right to cross the street, thus opened, with its railroad tracks, *in the same manner and subject to the same limitations as if the city, itself holding the fee, had granted the right to cross the street by the usual ordinance.*

C. & N. W. Ry. Co. v. *City of Chicago*, 151 Ill., 348, at 354–5.

No form of words can change the indisputable fact that, before the petition and judgment, plaintiff in error was the owner in fee simple, with all the right of disposition and use attached to that title, and *that the judgment of condemnation only leaves it a right to cross the street with its tracks—the same right which it would have acquired by the ordinary grant by ordinance of such a right to cross any public street of the city.*

So far as it may be said that the technical legal title is still in plaintiff in error, the title is the same nominal title which remains in any owner of a right of way for a railroad or street after a judgment of condemnation of a perpetual easement, and which it is well settled, should be regarded in proceedings for condemnation as having only a nominal value, and, therefore, entitling the owner to the full value of the land condemned.

Lewis on Eminent Domain, § 502.
Mills on Eminent Domain, § 51.

By the judgment of the trial court, affirmed by the state Supreme Court, the City of Chicago was expressly authorized to take possession of and appropriate this property on payment of the nominal sum of $1.

Not only is it manifest that this nominal sum of $1 is no compensation whatever in fact, when regard is had to the undisputed facts as to the valuable property and property rights appropriated by this judgment, but it is also well settled that in law *nominal damages* are not allowed as *compensation*. The only purpose of the allowance of nominal damages in any case is *to carry the costs*.

> *Chicago West Division Railway Co.* v. *West Side, &c., Elevated R. R. Co.*, 152 Ill., 519.
>
> 1 Sedgwick on Damages. Sec. 109 n. b. and cases cited.

And as in condemnation proceedings, the costs fall on the petitioner, there is no occasion in such cases for a judgment for nominal damages for the purpose of carrying costs.

> *Chicago West Div. Ry.* v. *West Side, &c., Elevated R. R. Co.*, 152 Ill., 519.

In fact, the theory of nominal damages has no proper place in a proceeding for condemnation.

In *South Park Commissioners* v. *Trustees of Schools*, 107 Ill., 491, the court in holding that, in a condemnation proceeding, the burden of proof on the question of compensation is on the petitioner, say:

"If a petitioner could take the land upon the payment of nominal damages, perhaps a different rule might prevail, but such is not the case; the land cannot be

taken and appropriated to public use *until full compensation shall be made.*"

Hence a new trial will not be granted to the plaintiff, where upon the whole case it appears that he is entitled to nominal damages only, unless the recovery of damages would have carried costs.

1 Sedgwick on Damages, Sec. 109, and cases cited.

And where nominal damages should be given on the facts as found, but the jury neglcted to find any damages, the court may amend the record by awarding a nominal sum as damages.

I, Sedgwick on Damages, Sec., 109 and cases cited.

The case of *Chicago West Division Railway Co.* v. *West Side &c., Elevated Railroad Co.*, 152 Ill., 519, is directly in point.

In that case, a proceeding to condemn certain property was brought by the Elevated Railroad Company. The property originally belonged to the Chicago West Division Railroad Company, but had been conveyed by it to the West Chicago Street Railroad Company for the term of 999 years. No compensation was awarded to the lessor company, and it was contended that for that reason the judgment should be reversed. The court, in overruling this contention, say :

"Under the terms of the lease, all property and all rights and franchises are absolutely transferred to the lessee for a period of 999 years. Nothing whatever is left in the lessor but the right to exist as a corporate body, for the purpose of receiving the rents provided for in the lease. * * * After the execution of the lease, it is difficult to see what title or estate remained in the lessor which was of such a value as to form a basis for awarding compensation. * * *

As a general rule, where a party to the proceeding has an interest in the premises, *but is really entitled to no compensation*, the practice has been to award nominal damages. *But we do not think that is required.* The only object in awarding nominal damages in any case *is for the purpose of carrying costs;* but in cases of this character, the petitioner always pays the costs, *hence no necessity exists for allowing nominal damages.*"

It follows that in law as well as in fact, the allowance to the defendant company in the judgment of condemnation of $1 as compensation, and the provision for its payment as a condition of taking possession, could as well have been omitted from the judgment.

It is not compensation at all. As we have seen, the failure to allow it to a party having a mere technical title but no actual interest entitling him to *actual compensation*, is not even error.

The judgment should therefore be read as if in form, as well as in fact, it made no provision whatever for compensation for the property of the plaintiff in error taken by it. The provision inserted for such compensation was not only merely nominal in fact, but so nominal in law that it could have been wholly omitted without affecting the legal effect of the judgment itself.

In fact, it has no place in a judgment of condemnation.

There can be no doubt or question as to the large and substantial value to the plaintiff in error of the property rights taken from it by this judgment.

No form of procedure or refinement of reasoning can change the indisputable fact that before the entry of this judgment it was the owner in fee of this tract of land having an area of 10,790 square feet, and having an actual market value, on the basis of the amounts

awarded the individual owners, of nearly $5,000, and that by this judgment the entire value of this property. except the single right to cross the street, when opened, in the same manner and subject to the same regulations and limitations as at any crossing of any street already opened, is appropriated by the public without compensation, and to consummate this ppropriation the company is required to deliver possession of the property to the city.

It does not change this indisputable fact that the action of the state court in making this appropriation took the form of a judgment of court, in a proceeding of condemnation.

Whatever the form of the proceeding, the undisputed fact remains that it resulted in an appropriation and taking by the state of the private property of the plaintiff in error without compensation.

Does not this very fact give to this court the full jurisdiction to review the action of the state court to determine, as it did in cases cited *supra*, whether that action, which resulted in this judgment of appropriation without compensation, preserved to it the due process of the law and the equal protection of the laws to which it was entitled?

While in its different rulings and in rendering the judgment, the state court professedly recognized the right of compensation, the fact remains that the result of its action was a judgment appropriating the property of plaintiff in error to a public use without compensation.

Does not this fact alone give the court the jurisdiction to review these rulings and determine whether they properly recognized and secured the constitutional right of plaintiff

in error to compensation for the property taken by the court's judgment, which it exercised in the cases cited *supra*?

This case is unlike the cases which may be cited, in which this court held that the statute of the state had provided an adequate mode of procedure, and that it would not review mere errors of the state court in the administration of the statute, which did not involve, as in this case, the very right itself. Here the very judgment is, on its face, a taking of private property without compensation, and therefore on its face a violation of the constitutional mandate. It is therefore directly within the reviewing power of this court, and nothing but a waiver by the plaintiff in error of the substantial right, which the constitution guarantees it, can withdraw the judgment from this court's power of review.

The case is also unlike cases which may be cited, in which it was held that this court should not review the action of a state court in passing on some question of fact, on which the plaintiff's title or right itself depended.

Here plaintiff's ownership of the property is undisputed. The large value of this property and its direct appropriation by the city, except as to the reserved right of crossing, is also undisputed. It is equally undisputed that, by the very judgment itself, these admitted property rights, of indisputable value to the plaintiff in error, are taken from it *without compensation*.

If the statute of the state had provided for the taking of the particular property, and for a method of procedure to determine the compensation to be paid, but had contained further provisions, making certain evidence that the value was merely nominal, which had no legitimate

tendency to prove that fact, admissible against it, and, in the absence of other proof, conclusive on the question of value, and by other provisions excluding other proof by the owner, so that, as the result of these different provisions a judgment of taking for a nominal compensation—no compensation—would follow, there could be no doubt that such a statute would be as obnoxious to the constitutional provision as if it had in terms provided that there should be no compensation.

Does it not follow that when the action of the state, appropriating private property without compensation, takes the form of judicial action instead of legislative, this court has the same power to review that action, on writ of error from the judgment, which it would have had to review like action by the legislature?

It is settled by repeated decisions of this court that, on writ of error from the highest court of the state, the question whether a particular right claimed under the Federal Constitution is protected by that instrument, will be determined by this court for itself, irrespective of any decision the state court may have made.

Huntington v. *Attrill*, 146 U. S., 657, at pp. 694, 4, and cases cited.

M. & O. R. R. v. *Tennessee*, 153 U. S., 486, at pp. 492–5, and cases cited.

Scott v. *McNeal*, 154 U. S., 34.

It is also well settled by the decisions of this court that this court will determine for itself, and without reference to the decisions of the court, whether a particular act of the state, acting through its constituted authorities, is a violation of any right secured by the Federal Constitution.

Id.

And, as a consequence of these rulings, it is held that if, in any case brought here by writ of error, this court finds from its own examination of the case, irrespective of the decision of the state court, that the plaintiff in error has a right secured to it under the constitution, and that the act of the state authorities complained of, whether legislative, executive or judicial, amounts to a violation of that right, this court will review and reverse the judgment of the state court.

Id.

These decisions rest on the fact that this power of review of the action of the state court on the different questions involved is an absolute necessity to the preservation and protection against encroachment by the state authorities of the rights guaranteed by the Federal Constitution.

Otherwise, as this court has had occasion to frequently point out, it would be in the power of the highest court of the state, by placing its decision sustaining the violation of the constitutional right, on the ground that the particular act was not a violation of it, or by some ruling on a question of procedure, to evade the prohibition of the constitutional provision.

To say that the prohibitions of the Fourteenth Amendment extend to the judicial department in the same manner as to the legislative and executive, and at the same time to say that this court is powerless to review the action of the state court which resulted in a judgment denying the constitutional right on the ground that this court will not review errors of the state court, would involve a contradiction in terms, and would, in its practical effect, exclude all judicial action from the operation of the amendment.

A more particular reference to the facts of the three cases will bring out still more clearly the nature and effect of the judgments involved and the method by which they were arrived at by the state court.

Article 5, section 1, clause 7 of the act under which the City of Chicago is incorporated (Ch. 24 Rev. Stat., Starr & Curtis Ed.), gives to the city council the general power "to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

Clause 89, section 1, article 5 of the same act provides:

"The city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way or land of any railroad company within the corporate limits, but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness."

The proceedings by the city to condemn are governed by article 9 of the same act, which provides for the filing of a petition by the city to "ascertain the just compensation to be paid, etc."

The Supreme Court of Illinois has held that, under this act, a proceeding to condemn property for the opening of a street should be treated *as to railroad property*, as an exercise of the power under clause 89 *supra*, and that therefore a judgment of condemnation against railroad property leaves in the company the right to cross the street, when opened, with its railroad tracks in the same manner, and subject to the same regulations, as at other street crossings, and that to this extent the appropriation

is not as complete as in the case of property owned by an individual.

It is, however, held that the proceedings to be commenced, whether against the property of an individual or of a railroad company, are regulated by the same provision (article 9 of the city charter), and that the judgment to be rendered is the same in form as to each.

In the recent case of *C. & N. W. Ry. Co.* v. *City of Chicago*, 151 Ill., 348, the Supreme Court of Illinois clearly defines the precise right which would remain in the railroad company under such a judgment.

In that case, it was expressly held that the only right in the condemned property, which remains in the railroad company after the judgment of condemnation, is "*the right to operate its trains over and across the street to the same extent and with the same limitations that it enjoys such right at public street crossings.*"

Otherwise, the appropriation of the property by the public is as complete as the appropriation of the property of the individual.

It is also well settled in Illinois, that in condemnation proceedings in that state, the "just compensation" for the land taken is a fact to be affirmatively proved by the petitioner, and that without proof of what would be just compensation it is not entitled to the judgment of condemnation.

McReynolds v. *B. & O. Ry. Co.*, 106 Ill., 157.

South Park Commissioners v. *Trustees of Schools*, 107 Ill., 491.

In *McReynolds* v. *B. & O. Ry. Co.*, *supra*, the court say:

"Should there, then, be no proof offered, the petitioner would be defeated. It would fail of having an ascertainment by the jury, upon proof offered, of what was a just compensation for the land, *without which it would be unable to acquire the land sought to be appropriated.*"

In *South Park Commissioners* v. *Trustees*, *supra*, the court say:

"The petitioner is compelled to institute the proceedings to *determine what shall be just compensation.* To the petition which may be filed by the corporation to condemn the land for public use, no answer or plea of any character is required to be filed, but the amount to be paid for the property taken *is to be determined upon the petition itself.* * * * If a petitioner could take the land upon the payment of nominal damages, perhaps a different rule might prevail. But such is not the case—*the land cannot be taken and appropriated to public use until full compensation shall be made.*"

In *Neff* v. *Cincinnati*, 32 Ohio State, 215, cited with approval and followed in *McReynolds* v. *B. & O. R. R. Co.*, the court say:

"The assessment was not to be made upon a claim of the property owners, but the city was required to have it made *before it could obtain the land.* * * * It is clear that the appropriation must fail, *unless an actual, and not a nominal, assessment is made.* * * * The statute authorizing the appropriation and providing for the compensation is framed so as to secure an *actual, and not a nominal, assessment.*"

In the case of the *Chicago & Northwestern Ry. Co.* v. *The City* (No. 10), the strip of land involved, as already stated, was 100 feet in length by sixty-six feet in width, and contained an area of 6,600 square feet. The property was owned by the company in fee simple. The case was submitted to the court for trial without a jury.

The evidence given for the city for the purpose of establishing the just compensation to be paid, and on which the judgment of the trial court and of the State Supreme Court affirming it, was based, is thus stated in the opinion of the Supreme Court:

"The city proved that so much of the right of way, being a strip 100 feet long and sixty-six feet wide, as it was proposed to use for a street, *had no market value for the use of a street*, subject to the rights of the railroad companies, and was not worth more than one dollar." (140 Ill. at 314.)

It will be observed that this evidence amounted only to testimony of the self-evident fact that a strip of land proposed to be used for a street, subject to the right of a railroad company to cross the street with its tracks, "*had no market value for the use of a street.*" That this would be so, however great the actual value *to the company* of the land or right appropriated, is manifest without proof, and the further statement by the witness that so much of the property as would be used under these conditions "was not worth more than one dollar," was manifestly a mere conclusion of the witness from this self-evident fact, and in any view had no legitimate tendency to *show the compensation to which the company was entitled for the property.*

This is made still clearer by the testimony of one of the same witnesses, the only one called for the city in the case of *C., B. & Q. R. R. Co.* v. *City* (No. 129).

In that case the witness, Wilson, testified over the objection of the plaintiff in error as follows:

Q. Now, Mr. Wilson, what is the value of so much, if any, *of the use* of the following described strip of land for the purpose of a railway company as is taken for the purpose of a public street, namely, that part of the right of way of the Chicago, Burlington and Quincy Railroad

Company lying south of the north line of the main right of way of the Chicago, Burlington and Quincy Railroad Company, and north of a line drawn parallel to the 138 feet north of the south line of block 9, and the south line of block 9 produced eastwardly, and lying west of the west line of block 8 produced northwardly, and the west line of the east 53 feet of block 9 produced northwardly; all in Walker's Douglas Park Addition to Chicago?

(Objected to; objection overruled, and exception.)

A. *Merely nominal;* subject to the rights of the railway company, *nominal.*

Q. I understand you to testify that, in your opinion, the right to use that tract for a public street, subject to the rights of the railroad company to use it, is merely nominal in value—one dollar?

A. Yes, sir.

Q. What do you understand the rights of the railroad company to be, which you say the right of the public is to be subject to?

A. Running and operating the same for such purpose—for railroad traffic generally.

Q. So, in your opinion, if I understand you, the right to the public to use in perpetuity a strip of land about 138 feet long and sixty-six feet wide, for a public street would be nominal in value. Is that correct?

A. No, sir.

Q. What is your conclusion?

A. *Subject to the rights of the railway company,* they having the right of way, as it were, a paramount right.

Q. That is the only qualification you make?

A. I think so, now. *There is no market value for such a right.* (Rec. 34, 35.)

Not only was the original question, to which this testimony was an answer, objected to by plaintiff in error, the court overruling the objection, but after he had given the further testimony that the basis of his conclusion was that "there is no market for land covered by railroad tracks subject to railroad rights," a motion to exclude the evidence was made and overruled. (Rec., 37.)

The controlling effect given to this false and unjust measure of value, which would necessarily lead in every case to a finding of nominal compensation, is shown by the record in the case at bar (No. 129).

In that case, the State Supreme Court expressly recognized this false measure of supposed value:

(1.) By sustaining the action of the trial court overruling the objection to the question, which asked for the value of the use to the city, subject to the rights of the railroad company, etc., and not the depreciation in value of the property of the railroad company.

(2.) By sustaining the action of the trial court overruling the motion to exclude this testimony, when the cross-examination developed that the evidence was an inference from the undisputed fact that the particular strip would have no *market value* subject to the right of use for railroad tracks.

(3.) By its affirmance of the judgment appropriating the property on payment of this nominal sum, as *fully sustained by which had for its only basis the evidence of the petitioner.*

And this is made still clearer by the fact that, in affirming the judgment in this case, the State Supreme Court was professedly following *C. & N. W. Ry. Co.* v. *City*, in which that court expressly said that the evidence on which the judgment which was affirmed was based was, that, "so much of the right of way, being a strip 100 feet long and 66 feet wide, as it was proposed to use for a street, *had no market value for the use of a street*, subject to the rights of the railroad companies, and was not worth more than one dollar."

It is manifest that the necessary effect of the ruling, admitting this evidence as the proper basis of a judgment finding the compensation to which the company was entitled, was to limit any recovery based on it to the nominal sum of one dollar, no matter what might be the area or value of the property.

Consistently with this ruling, the trial court, following the general ruling in *C. & N. W. Ry. Co.* v. *City*, and carrying it to its logical conclusion, also excluded a great variety of questions asked of the witness on cross-examination for the purpose of eliciting his testimony as to the amount and elements of value and depreciation involved in the real issue to be tried, viz: the just compensation to be paid to the railroad company for the appropriation of its property. (Rec., 35-6.)

In like manner, the railroad company having called experts, who properly qualified, the court, following the same ruling, excluded every variety of question asked these witnesses, for the purpose of eliciting the different elements of value and depreciation, and their opinions, etc. (Rec., 52, 57-60, 65, 66-70.)

As a consequence of these rulings, there was no evidence on which to base the judgment of condemnation, the necessary condition of which, as we have seen, was the ascertaining and awarding *the actual* compensation to the plaintiff in error, except the undisputed facts showing the clear right of the plaintiff in error to *actual* and not merely nominal compensation to a substantial amount, and the improper evidence of the single witness for the city, that the value of the use *to the city* was "merely nominal"—"had no market value."

The final result of all these rulings was, that while it

fully appeared that the land appropriated was not only owned by the company, but had a large value which would be substantially affected, the only evidence left in the case as to compensation or value was the irrelevant and improper evidence of the witness for the petitioner, that the right of use for a street, subject to the right of the railroad company to cross with its tracks, had no other than a merely nominal value. And on this evidence the trial court based its judgment taking of the property without compensation and the Supreme Court its affirmance of that judgment. (149 Ills., at463).

IV.

THE RULINGS OF THE STATE COURT IN RENDERING THE JUDGMENT OF CONDEMNATION OF THE PROPERTY OF PLAINTIFF IN ERROR WITHOUT COMPENSATION.

We now ask the attention of the court to the particular rulings of the State Court—as further illustrating the real basis and effect of the judgment in question.

The only evidence offered by defendant in error, the city, to show the *amount* of the compensation to which plaintiff in error was entitled, was the evidence of one witness, C. B. Wilson. All the evidence offered by plaintiff in error for that purpose was excluded by the trial court. The judgment for a nominal compensation, therefore, rests wholly on the evidence of this single witness for defendant in error. His testimony on the subject was as follows:

Q. Now, Mr. Wilson, what is the value of so much, if any, of the use of the following described strip of land for the purpose of a railway company as is taken for the purpose of a public street, namely, that part of the right

of way of the Chicago, Burlington and Quincy Railroad Company lying south of the north line of the main right of way of the Chicago, Burlington and Quincy Railroad Company, and north of a line drawn parallel to the 138 feet north of the south line of block 9, and the south line of block 9, produced eastwardly, and lying west of the west line of block 8, produced northwardly and the west line of the east 53 feet of block 9, produced northwardly; all in Walker's Douglas Park Addition to Chicago?

(Objected to; objection overruled, and exception.)

A. Merely nominal; subject to the rights of the railway company, nominal.

Q. So in your opinion, if I understand you, the right to the public to use in perpetuity a strip of land about 138 feet long and sixty-six feet wide, for a public street would be nominal in value. Is that correct?

A. No, sir.

Q. What is your conclusion?

A. Subject to the rights of the railway company they having the right of way, as it were, a paramont right.

Q. That is the only qualification you make?

A. I think so, now.

There is no market value for such a right.

There is no market for land covered by railroad tracks subject to the railroad rights in such sizes. (Rec., 30, 34–5.)

(1.) It will be observed that the question put to the witness was, "What is *the value* of so much, if any, *of* "*the use of* the following described strip of land for the "purpose of a railway company, *as is taken for the pur-* "*pose of a public street*," etc. That is, the witness was in effect asked his opinion as to the value to the city of the use of which it acquired. And even so far as the question involved the element of the damage to the proyerty of plaintiff in error, it was expressly limited to its use "for the purpose of a railway company."

In the most favorable view to the city, the true question was as to *the depreciation in the value of the property* of plaintiff in error as the result of its admitted partial appropriation by the public. By the question put and sustained by the court, the attention of the witness was withdrawn from the real question, to the wholly different one "*of the value of the use.*" As the result, the witness reaches the manifestly erroneous conclusion, that, because of the fact that a "use" of the particular kind had "no market value," therefore, the compensation to which appellant was entitled was "merely nominal—one dollar."

(2.) The witness having given the answer "merely nominal—one dollar," defendant in error rested without calling for the basis or reasons for his conclusion. The cross-examination of the witness developed that,—while his testimony proceeded on the correct theory of fact that plaintiff in error would be deprived of all use of its property, which would be in any way inconsistent with its continuous use in perpetuity for the purpose of a public street—the basis of his conclusion that compensation to plaintiff in error should be "merely nominal—one dollar," was the single fact that the right of user acquired by the city had "no market value." He says: "There is no market value for such a right," *ergo*, appellant is entitled to "merely nominal" damages for the manifest destruction of a large part of the value of its property.

That "there is no *market value* for such a right" is self-evident, and it is equally self-evident that that fact would have no possible bearing on the real question, the amount of "decrease in value" "caused by the use for "the purposes of a street," and for the same reason an

opinion admittedly based on that fact could have no bearing on the question.

(3.) This ruling of the trial court, affirmed by the Supreme Court, is made still clearer by the further ruling in excluding certain questions asked of this witness on cross-examination. The following questions, asked of this witness on cross-examination, being objected to by defendant in error, were excluded by the court:

Q. What, in your opinion, would be, or was, the value of this land to the railroad company, or to any one *for use for railroad purposes*, at the date of the filing of the petition?

Q. What was the fair market value at the date of the filing of the petition, of this particular strip of land included within the proposed street, for use or sale *or any lawful purpose*, at the date of filing the petition?

Q. What would be the fair market value of this particular strip of property, *subject to the right of the public to use it for a public street?*

Q. In your opinion, *is the value or will the value of that strip of land be* depreciated by the opening of this public street across it?

Q. In your opinion, *will the value of the use of this particular strip of land* be depreciated in any way by the opening of this public street across it or over it?

Q. Will the value of the use of this particular strip of land *for railroad purposes* be depreciated by the opening of this street across it?

Q. Do you say that the right of the railroad company as owner of the property included in this strip, to its exclusive use *is worth no more than the mere right of joint user with the public.* (Rec., 35–6.)

As we have said the rulings of the trial court in excluding these various questions and other similar and additional questions in the same line, asked of the witnesses for plaintiff in error and the judgment of affirmance by the Supreme Court were based on *C. & N. W. Ry.* v. *City of Chicago*, 140 Ill., 510 and the rule supposed to

have been established by that case, as claimed by the attorney for the city.

Plaintiff in error called two witnesses to testify as to the amount of the damages to which it was entitled, F. A. Delano, its Superintendent of Freight Terminals, and George M. Bogue, former railroad commissioner, etc., and a real estate dealer of large experience.

Each of these witnesses testified to the knowledge and experience necessary to qualify him to give evidence on the subject, and in fact, no question was made as to the competency of either. (Rec., 52, 65.)

The facts heretofore stated, showing the nature and substantial character of the damage to the value of appellant's property, having been shown, a great number of questions were asked of these witnesses for the purpose of eliciting their evidence as to the amount of the damages by reason of the proposed taking, and also as to other particular amounts and values which would properly enter as elements in the general question to be determined by the jury. (Rec-, 57–60, 66–70, 71.)

All these questions, which were put in a variety of forms, were excluded by the court, in the same manner as the question put on cross-examination of the witness Wilson, as incompetent, under the case of *C. & N. W. Ry.* v. *City of Chicago*, *supra*, and the rule supposed to be established by that case.

(1.) As the purpose of the proceeding, as ruled by the State Supreme Court, was not the condemnation of the fee, but only of a perpetual right of user by the public for the purpose of a street, subject to the right of crossing by plaintiff in error, the measure of damages for the taking must necessarily be the depreciation in value of the

land, as the result of the appropriation of this right of user. This would be the difference between the value of the land owned in fee and free from this right, and its value, subject to this right.

These values we endeavored to show by the following questions asked of Mr. Bogue, and excluded by the court:

Q. What, in your opinion, was the cash market value of that land, to which I called your special attention, within the proposed street, on November 12, 1890?

Q. What, in your opinion, is the present cash value of that land? (Rec., 66–7).

Q. Assuming that the railroad company should remove its tracks from the property in question in this proceeding and offer the same for sale, what would be the fair cash market value thereof?

Q. Assuming the same facts, what was such market value at the time of the filing of the petition? (Rec., 68-9.)

This evidence having been excluded, it was useless to attempt to pursue the subject further by showing that the land had a special value for particular uses in addition to its market value or the value subject to the proposed right of user.

The following questions were, however, asked in that direction:

Q. What, in your opinion, would be the value of the use of the land in question for railroad purposes, not subject to any right of the public to use it for the purposes of a street?

Q. What, in your opinion, was the value of the use of the land in question for railroad purposes, not subject to any right of the public to use it for the purpose of a public street, on November 12, 1890? (Rec., 68.)

The witness was also asked as to the other element—the value of land, subject to the use to be acquired—by the following questions, which were excluded by the court:

Q. Assume that if the proposed street is opened across the land and right of way of the railroad, the railroad company should remove its tracks from the property and offer the same for sale, what would be the cash market value of this property? (Rec., 69.)

Q. What, in your opinion, would be the value of the use of the land in question for railroad purposes, subject to the rights of the public to use it for a street, such use for the purposes of a street being subject to the use by the company for railroad purposes? (Rec., 68.)

Substantially the same questions were also asked Mr. Delano and excluded by the court. (Rec., 58, 60.)

(2.) It is well settled that in this class of cases, where the question is as to the value of the land taken or depreciation in value, etc., the evidence of witnesses having a knowledge of the subject, as to the amount of such value or depreciation, etc., in their opinion, is competent. In fact, except in particular cases, this evidence is the only evidence obtainable for the purpose of showing the *amount* of damage; and the case before the court was peculiarly a case for such evidence.

The fact that the fee of the land was not taken being indisputable, on the one hand, and the fact that there was a definite, tangible and large destruction of value of the land, being equally indisputable, plaintiff in error clearly had the right to give in evidence the opinions, of witnesses, competent to form an opinion as to the amount of the dimunition in value or other damage.

See: *Hayes* v. *O., O. & F. V. R. R. Co.*, 54 Ill., 376.

G. & S. W. R. R. Co. v. *Haslam*, 73 Ill., 494.

L. S. & M. S. Ry. v. *W. I. R. R.*, 100 Ill., 33.

City v. *McDonough*, 112 Ill., 85.

The following questions asked of Mr. Bogue for the purpose of eliciting of his evidence as to the amount of the damage to appellant's property were objected to by appellee and excluded by the court:

Q. What, in your opinion, will be the amount of depreciation, if any, to the land of the respondent company proposed to be crossed by the proposed street, by reason of the opening of the street and the consequent right in the public to use it for the purposes of a street.

Q. Assuming that the effect of opening Rockwell street across respondent's land, the land to which I have called your attention, would be to deprive the company and all who may acquire title under it of all use of the land, except for railroad tracks, how much, in your opinion will the opening of the street depreciate the value of the land?

Q. Assume the same facts in the last question, how much will the opening of the street depreciate the value of the land for railroad purposes?

Q. Assume that the effect of opening the street across this land will be to deprive the company and those acquiring title under it of all use of the strip of land crossed by it, except for railroad tracks, and that this use will also be subject to the right of the public to use it as a street, subject, however, to the right of the company to operate its railroad tracks, will the opening of the street depreciate or otherwise effect the market value of the land; and if so, to what extent, or in what amount?

Q. Is a piece of land which can only be used for the purpose of railroad tracks, and then only subject to the right of the public to also use it as a street, worth more, or less, for the purposes of sale than the same piece of land free from any restrictions as to its use in case of its sale? If you say it is worth less, what per cent. less would its market value be?

Q. Assume that at the time of the filing of the petition there were certain tracks laid on the land included within the proposed street, and that it has been otherwise unoccupied, and that the land of respondents so included is of sufficient width to make it practical to lay and operate upon it additional main tracks and additional side-

tracks, and that the effect of the opening of the street by these proceedings will be to deprive the company of the right to lay such additional tracks, will the value of the land which is included within the proposed street depreciated or otherwise diminishes in value for use for railroad tracks by reason of the fact that the right to lay such additional tracks is thus taken away?

Q. Assume that the railroad company has a right to use the property in question for any lawful purpose, what is the market value of property for uses other than laying tracks across the same and running trains thereon?

Q. How much would such market value be depreciated by subjecting the property to the perpetual right to occupy the same as a public street?

Q. How much is the value of the use of the property in question for railroad purposes depreciated by the occupation of the same as a public street?

Q. How much is or would be the value of the use of the property in question for purposes other than the right to lay tracks on it and operate the same to be depreciated by the occupation as a public street? (Rec., 66–70.)

Mr. Delano was also asked substantially the same questions, which were in like manner objected to and excluded by the court. (Rec., 57–60.)

(3.) Plaintiff in error also asked the following questions of the witness Delano, which being objected to by appellee, were excluded by the court as incompetent:

Q. Assuming the street to be opened across these tracks, what will it be necessary for the repondent company to do for the safe and proper operation of its railroad, by reason of the opening of the street across it, and what expenditures on its part will be made necessary on that account?

Q. Will it be necessary for the respondent company, by reason of the opening of the proposed street, in order to the proper operation of its railroad, to construct gates, and to employ men to operate the gates; and if so, what would be the necessary expenditure on that account?

Q. If no gates should be erected, would it be necessary, by reason of the opening of the street, in order to the proper operation of the railroad, for the company to employ a flagman at the crossing of the proposed street?

Q. Would it be necessary, on account of the opening of the street, and in order to the proper operation of the respondent's railroad, to plank across the crossing and fill in between the rails, and put in an extra rail; and if so, what would be the necessary expenditure on that account? (Rec., 59–60.)

The following offer of proof was also made:

Mr. Herrick: I offer, in this connection, if the court please, to prove by this witness, that in case this street is opened, it will be necessary for the company, in order to the proper and safe operation of its railroad, to construct a set of gates and a tower for operating the gates, plank the crossing, fill between the rails, and put in a extra rail, at a total expense of $2,109, and to incur an annual expense of depreciation, maintenance, employment of gatemen, etc., of $1,878.

This evidence was also objected to and excluded by the court. (Rec., 60.)

It will be observed that these questions and this offer of proof involved showing, not that the particular expenditures would be necessary because of any statute or ordinance, but *that they would be made necessary by reason of the fact of the opening of the street, in order to the proper and safe operation of the respondent's railroad.*

This evidence, like all the other evidence offered, was excluded by the court, as not admissible, under the decision in *C. & N. W. Ry. Co.* v. *City*, 140 Ill., *supra*.

Two questions are presented by this ruling:

1. If there were no such statute in force, would the amount of these expenditures be just recoverable under the evidence offered?

2. If they would be recoverable if there were no such statute, does the fact that there is a statute which imposes the affirmative duty of making them, prevent their recovery as elements of damage?

1. If there were no such statute in force, would the amount of these necessary expenditures be justly recoverable under the evidence offered?

It will be remembered that the offer was to show that these expenditures *would be necessary on account of the opening of the street*, in order to the proper and safe operation of appellant's road.

We do not claim that the particular items of expenditures for planking, an extra rail, gates, etc., are recoverable as such, but that *proof that they will be necessary as the result of the opening of the streets is admissible* for the purpose of showing that the property of plaintiff in error will be subject to this additional burden—and they should therefore be considered in arriving at the amount of the damage. Just as it has been repeatedly held that proof that the condemnation of a right of way for a railroad or a street through a farm will make certain expenditures for fencing necessary, and that the amount of such necessary expenditures should be allowed as proper elements of damage.

T. & P. R. R. Co. v. *Unsilkel*, 22 Ill., 221.

Butte County v. *Boydston*, 64 Cal., 115.

Stone v. *Heath*, 135 Mass., 561.

Lewis on Eminent Domain, § 498, and cases cited.

So where a right of way for a railroad is condemned through a farm, it is proper to consider the expenses to the owner of constructing the necessary farm crossings.

Lewis on Eminent Domain, § 496, and cases cited.

And in the same way, it has been repeatedly held that in case of the opening of a highway across a railroad, evidence of similar necessary expenditures to those in question for planking, gates, etc., are admissible and should be allowed as elements of damage.

That such expenses are recoverable as proper elements of compensation, independent of the requirements of any statute, where they are the necessary consequences of opening a highway, was expressly held in the following cases:

Old Colony & Fall River R. R. v. *Plymouth*, 14 Gray, 155.

Central R. R. Co. v. *Bayonne*, 51 N. J. Law, 428.

People v. *L. S. & M. S. R. R.*, 52 Mich., 277.

Grand Rapids v. *Grand Rapids & Indiana R. R. Co.*, 58 Mich., 641.

Chicago & Grand Trunk Ry. Co. v. *Hough*, 61 Mich., 507.

K. C. R. R. Co. v. *Commissioner*, 45 Kans., 716.

Kansas City v. *Kansas City Belt Ry. Co.*, 103 Mo., 633.

And such was the principle in the ruling in the following cases decided by the Supreme Court of Illinois:

C. & A. R. R. Co. v. *S. & N. R. R.*, 67 Ill., 147.

L. S. & M. S. R. R v. *C. & W. I. R. R.*, 100 L., 21.

P. & P. U. Ry. v. *P. & F. Ry.*, 105 Ill., 112.

St. L., J. & C. R. R. v. *S. & N. R. R.*, 96 Ill., 274.

In *Grand Rapids* v. *Grand Rapids and Indiana R. R. Co.*, 58 Mich., 641, the rule is thus forcibly stated by CAMPBELL, C. J.:

"The damage done to a railroad by having a highway run across it *must necessarily involve all the different expenses entailed by such crossing*, which, in a city, may involve a considerable outlay in making the crossing safe and providing guards against accidents. *Under the constitution there must be just compensation, and this cannot be denied by the law or the verdict.*"

In *Chicago and Grand Trunk Ry. Co.* v. *Hough*, 61 Mich., 507, the court say:

"The constitution expressly forbids any appropriation of private property without just compensation. There is no power in the legislature to create any exception to this rule, and nothing is just compensation which does not make good all the pecuniary outlay or loss occasioned to the owner by the appropriation of its property. * * * If a railroad interferes with an existing highway, it must bear all the expense of crossing, and restore the highway, so far as practicable, to a safe condition, and to put in what fences and cattle guards are necessary for that purpose. But, as pointed out in 52 Mich., 277, *when a new highway is created, then it belongs to those who create it, to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions.*"

In *K. C. R. R. Co.* v. *Commissioners*, 45 Kans., 716, the court, in allowing a recovery for the expense of constructing cattle guards, fences, etc., say:

"Must the railroad company bear these burdens and

suffer these losses without compensation? Why should it be treated differently from others who have an interest in real estate? All others having an interest in real estate are entitled to compensation for losses resulting from the condemnation of a public highway, interfering with their free and rightful use of such interest. And why should not a railroad company be entitled to compensation in like cases?"

In the *City of Kansas* v. *Kansas City Belt Ry. Co.*, 102 Mo., 633, the court say:

"Here the city seeks to widen the street, and in doing this not only appropriates part of defendant's right of way, but throws upon the company the expense of removing banks of earth and readjusting the bridge to conform to the new order of things. *These expenses thus made, on the plainest principles of justice constitute elements of damage to be allowed the company in the proceeding to condemn the property*, for the bridge structure is property as much as the land on which it rests."

The rule could not be stated in language more forcible and appropriate to this case than the language of the Supreme Court of Illinois in *C. & A. R. R. Co.* v. *S. & N. W. Ry. Co.*, 67 Ill., 142, which, it will be remembered, was the case of one railroad crossing another, where the courtsay:

"Appellants are entitled to such sum for damages, to be paid by appellee in money *as will enable appellant to construct and keep in repair all such works as may be necessary to keep their track in safe and proper condition. Nothing short of this can amount to the 'just compensation' provided by law.*"

In a separate opinion in *C. & A. R. R. Co.* v. *J., L. & A. Ry. Co.*, 105 Ill., 388, Mr. Justice SCHOFIELD, referring to the condemnation by one railroad of a crossing over the railroad of another, said:

"If the switch or siding cannot be operated efficiently with the crossing over it, it should be moved elsewhere,

and the condemning road taxed with the damage thereby occasioned. If it can be so operated, but only after incurring additional expenses, *the condemning road should be taxed with that expense.*"

We submit, therefore, that if there were no statute requiring these expenditures for planking, gates, etc., and it should be shown, as we offered to show, that *these expenditures would be made necessary by the opening of the street*, in order to the proper and safe operation of appellant's road, evidence of the amount of such necessary expenditures would be admissible as proper elements of damage both on reason and authority.

This brings us to the question:

2. If these expenditures would be justly recoverable if there were no such statute, does the fact that there is a statute which imposes the affirmative duty of making them, prevent their recovery as elements of damage?

As the Supreme Court of Illinois pointed out in *C. & N. W. Ry.* v. *The City*, the statute had no existence prior to 1874, and is subject to repeal at the next session of the legislature, like any other statute. There is a plain distinction between expenditure which must be made by a company as the result of a crossing, in order to maintain the safe and proper operation of its road—to enable it to continue the use of its road in a proper manner for the uses for which it was built, and in the performance of its continuing duty as a common carrier; — and expenditures made necessary *simply because of the provision of an act of the legislature, which may be repealed to-morrow, and which has no necessary connection with the safe and proper operation of the railroad.*

It is only on this ground that the cases of *C. A. & R. R. Co.* v. *S. & N. W. Ry. Co.*, 67 Ill., 142; S. C., 96 Ill., 275, and the subsequent cases of *C. & A. R. R. Co.* v. *J. L. & A. R. R. Co.*, 105 Ill., 388, and *P. & U. P. Ry. Co.* v. *P. & F. Ry. Co.*, 105 Ill., 118, can be reconciled.

In the case of 67 and of 96 Ill., which has never been overruled, but has been repeatedly cited with approval in subsequent cases, it was expressly held that expenditures made necessary by the crossing of one road by another, in order to the proper and safe operation of the road and in discharge of the company's duty as a common carrier—were recoverable. On the other hand in the two cases of in 105 Ill., it was held that the damage which resulted from the mere obedience to a statute, requiring the stoppage of all trains at a particular distance from the crossing, but having no necessary connection with the safe and proper operation of the road, could not be recovered. The plain distinction is pointed out in these cases.

In *P. & P. U. Ry.* v. *P. & F. Ry.*, *supra*, the court say: "The law requiring trains to stop on reaching and crossing anotqer railroad, is a police regulation, *and may be retained and repealed at the pleasurs of the legislature. No one can say that it is permanent, or how loog it may continu. It is subject to repeal at any session of the legislature. It would, therefore, be mere matter of conjecture to say if any damage would be sustained by appellant for the delay, incanvenience and trouble produced by complyance with the requirements of the statute.*"

In *C. & R. R. Co.* v. *J., L. & A. Ry. Co.*, 105 Ill., 388, the court say: "The statute in question is simply a police requisstion, relating to binding and upon all railroad companies in the state, whether incorporated before or since its passage. *Its duration rests in the will of the General Assembly.*"

And in the recent case of *C. & W. I.* v. *E. C. Ry. Co.*, 115 Ill., 375, the court, referring to *C. & A. R. R. Co.* v. *I., L. & A. R. R. Co.*, *supra*, say: "So far as the case of the *Chicago and Alton Railroad Company* v. *The Joliet, Lockport and Aurora* is concerned that simply holds that damages which result from the stopping of trains before making a railroad crossing, in conformity with the requirements of the statute, cannot be treated as an element of damages in the condemnation proceedings *on the ground that the statute is a mere police regulation, liable to be repealed at any time.*"

In the case before the court we asked nothing *on account of the statute.* We base our claim on the fact offered to be proved, that *the expenditures will be the necessary result of the opening of the street, wholly irrespective of the statute, and whether it is repealed or not.*

The fact is that, for the reasons pointed out in the cases in 105 Ill., the existence or non-existence of the statute has nothing to do with the question of the damages recoverable. It cannot enter into the question one way or the other, and we come back to the question: Are the elements of damage claimed justly recoverable as a matter of law, *as the natural consequences of the opening of the street* and irrespective of the statute?

The language of the opinion in *C. & N. W. Ry. Co.* v. *City*, as well as the reasoning of the opinion would indicate that the question, and the only question the court considered, was whether the particular expenditures could be recovered *solely because the duty of making them was imposed by the statute.*

Thus the court say:

"The fact that it (the company) asks compensation for such damages, is a concession of its intention to make and maintain the crossing, and *the presumption is that such intention will be carried into effect because of the requirements of the law on that subject.*"

And, again:

"The items of expenditure for which appellant claims compensation *are such only as are involved in its compliance with a police regulation of the statute.* It is well settled that 'neither a natural person or a corporation can claim damages *on account of* being compelled to render obedience to a police regulation designed to secure the common welfare.' *C. & A. R. Co.* v. *J. L. & A. Ry. Co.*, 105 Ill., 388."

To say, that, although these damages could be recovered if there were no statute, they cannot be recovered because there is a statute which imposes an affirmative duty to make the expenditures would be practically to say that, notwithstanding the indisputable damage to the property of plaintiff in error, there can be no recovery at all.

It is undisputed that, before this street was opened, plaintiff in error owned this property by a fee simple title, and that by the opening of the street its saleable value was practically destroyed, and plaintiff in error is limited to a narrow and restricted use which may at any time be wholly valueless to it.

It could as well be argued that this damage, which will indisputably result to plaintiff in error, will only come to it from obedience to some statute or law, that plaintiff in error still owns the fee of this property, that it can still sell the property, that if, because of the opening of the street, it cannot stand cars upon it, put buildings upon it, etc., as before, there is no legal damage for the reason that, in not doing these things, it only acts in obedience to the statute to which we have referred, and, as there can be no recovery for obeying the law, it should not recover at all.

We concede that, both logically and under the principle of previous decisions of the Supreme Court of Illinois, no expenditures would be recoverable *merely because re-*

quired to be made by statute or ordinance, for the simple reason, if no other, that such statute or ordinance were subject to repeal at any time, and the alleged damages on account of it would be wholly contingent.

We have, however, shown that a different question is presented, when in it is proposed to show that the particular items of expenditure *would be made necessary by the very opening of the street, in order to the proper and safe operation of the railroad*. The necessity in such a case would arise, not from any repealable statute or ordinance, but from the very fact of the opening of the street.

V.

THE JUDGMENT OF THE STATE COURT DENIED TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

It appears from the judgment itself, in connection with the record, that by the same proceeding and by the same judgment, individual property owners were awarded, as compensation for immediately contiguous property appropriated to the use of the public by the same proceeding, a judgment at the rate of about $5,000 for the same area of property. (Rec., 11, 12, plat 42.) At the same time, by the same proceeding and by the same judgment, the plaintiff in error, as the result of the different rulings of the trial court, was only awarded the nominal compensation of one dollar for a like appropriation of its contiguous property of the same area, except that the right of crossing was reserved to it, the nominal sum of $1—no compensation whatever.

JOHN J. HERRICK,
Attorney for Plaintiff in Error.

G. W. BLYTHE,
Counsel.

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Office ... Court, U. S.
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JAMES H. ... Y.

166-226

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

No. 129.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO,
Defendant in Error.

IN ERROR TO SUPREME COURT, STATE OF ILLINOIS.

MOTION TO DISMISS, or IN THE ALTERNATIVE, TO AFFIRM, under Rule 6; and BRIEF FOR DEFENDANT IN ERROR.

JOHN S. MILLER AND
WILLIAM G. BEALE,
For Defendant in Error.

BARNARD & MILLER PRINT, CHICAGO.

quired to be made by statute or ordinance, for the simple reason, if no other, that such statute or ordinance were subject to repeal at any time, and the alleged damages on account of it would be wholly contingent.

We have, however, shown that a different question is presented, when in it is proposed to show that the particular items of expenditure *would be made necessary by the very opening of the street, in order to the proper and safe operation of the railroad.* The necessity in such a case would arise, not from any repealable statute or ordinance, but from the very fact of the opening of the street.

V.

THE JUDGMENT OF THE STATE COURT DENIED TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

It appears from the judgment itself, in connection with the record, that by the same proceeding and by the same judgment, individual property owners were awarded, as compensation for immediately contiguous property appropriated to the use of the public by the same proceeding, a judgment at the rate of about $5,000 for the same area of property. (Rec., 11, 12, plat 42.) At the same time, by the same proceeding and by the same judgment, the plaintiff in error, as the result of the different rulings of the trial court, was only awarded the nominal compensation of one dollar for a like appropriation of its contiguous property of the same area, except that the right of crossing was reserved to it, the nominal sum of $1— no compensation whatever.

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For Defendant in Error.

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM, UNDER RULE 6.

Now comes the city of Chicago, defendant in error, by John S. Miller, its attorney, and moves that the writ of error aforesaid be dismissed at the costs of the plaintiff in error, and for judgment in its favor and against said plaintiff in error for costs, upon the following grounds:

1. Because in said suit there was not drawn in question the validity of the Act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of cities and villages," or any part thereof, or an act entitled "An act to provide for the exercise of eminent domain," or any part thereof, or any other act of said General Assembly, as being repugnant to the fourteenth amendment to the Constitution of the United States, as is herein alleged by plaintiff in error.

2. Because in said suit there was not drawn in question by the record, proceeding or judgment therein the validity of said statutes, or any of them, or any part thereof as being contradictory to section 10 of article I of the Constitution of the United States, as herein asserted by plaintiff in error.

3. Because there was not drawn in question in said suit, under the rulings and judgment of said court, the validity of said statutes or any or either of them, or any part thereof, as being contradictory to the fifth amendment to the Constitution of the United States, as herein asserted by the plaintiff in error.

4. Because there was not in said suit drawn in question the validity of said statutes or any or either of them

or any part thereof under the rulings and judgment of said court thereon, as depriving the Chicago, Burlington & Quincy Railroad Company of its property without due process of law, or as denying to it the equal protection of the law contrary to the fourteenth amendment to the Constitution of the United States, as herein asserted by the plaintiff in error.

5. Because in the said suit in the Supreme court of Illinois, in which the said judgment was rendered, there was not drawn in question the validity of an authority exercised under a statute of said state on the ground of its being repugant to the fourteenth amendment to the Constitution of the United States, as herein asserted by plaintiff in error.

6. Because in the said suit there was not drawn in question the construction of a clause of the Constitution of the United States, nor was the decision against any title, right, privilege, immunity or exemption claimed under such or any clause of the constitution.

7. Because it appears from the aforesaid record that this court is without jurisdiction to review the said record and proceedings or the said judgment of the Supreme court of Illinois, or to entertain, hear and determine said writ of error or suit.

And the defendant in error also moves, in the alternative, in accordance with rule 6 of the rules of this court, that the said judgment of the Supreme court of Illinois be affirmed, on the ground that, although the record may show that this court has jurisdiction (if it be so held herein), it is manifest that the question on which such jurisdiction depends is so frivolous as not to need further argument.

JOHN S. MILLER,
Attorney for Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

The City of Chicago filed in the Circuit court of Cook county, Illinois, November 12, 1890, its certain petition for condemnation for the opening and widening of Rockwell street between West 18th street and West 19th street in said city, which included the extension of said Rockwell street over the right of way or railroad of the Chicago, Burlington & Quincy Railroad Company, making, among others, the said railroad company a party defendant, and praying that it be summoned, and that the just compensation to the said company and the other defendants to be paid, etc., be ascertained by jury in the manner provided by law (Pr. Trans., 3, 6). The defendant the Chicago, Burlington & Quincy Railroad Company, afterwards entered its appearance in writing (Pr. Trans., 8); and also filed in said court its certain cross-petition for the assessment of damages to property not taken. (Print Trans., 84, 85.) The filing of such a cross-petition by the defendant in a condemnation proceeding is held to be an appropriate mode of bringing before the court property of the defendant taken or damaged and not described in the petition.

Railroad Co. v. *Hopkins*, 90 Ill., 316, 318.

Johnson v. *Railway Co.*, 111 Ill., 413, 417.

The cause was heard in said court before a jury duly impaneled and resulted in a verdict by the jury finding

that the just compensation to be paid to the said railroad company to be the sum of one dollar. (Pr. Trans. 10, 11.) The defendant railroad company appeared upon the hearing by its counsel, participated in the trial, presented its evidence on its behalf upon the question of the amount of compensation, and the arguments of its counsel before the jury. (Pr. Trans., 13 to 76.) Upon the rendering of the verdict the railroad company presented and argued its motion for a new trial, which motion was overruled and judgment of the court entered upon the verdict. (Pr. Trans., 77, 79, 12, 13.) Appeals lie from such judgments, under the statute, to the Supreme court of Illinois,

Hyde Park v. *Dunham*, 85 Ill., 569.

The railroad company thereupon prayed and was allowed and prosecuted its appeal to the Supreme court of Illinois, where after full argument by counsel for the railroad company the judgment of the Circuit court was affirmed.

The provisions of statute under which the said condemnation proceedings were instituted and carried on, so far as they are of importance here, are as follows :

The city of Chicago in 1875 adopted as the charter of the city, pursuant to its terms, the general act of the general assembly approved April 10, 1872, entitled "An act to provide for the incorporation of cities and villages" which forms chapter 24 of the revised statutes of Illinois. The following provisions are from that act :

Art. V., Section 1, Clause 89. "*Eighty-ninth.* The city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad com-

pany (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness." (Rev. Stat. Ill., Ch. 24, Art. V., Sec. 1, Clause 89.)

Art. IX. SECTION 1. That the corporate authorities of cities and villages are hereby vested with the power to make local improvements by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe.

"SEC. 3. Should said ordinance provide for improvements which require the taking or damaging of property, the proceeding for making just compensation therefor shall be as follows:

"SEC. 4. Whenever any such ordinance shall be passed by the legislative authority of any such city or village, for the making of any improvement mentioned in the first section of this Act, or any other local improvement that such city or village is authorized to make, the making of which will require that private property be taken or damaged for public use, such city or village shall file a petition in some court of record of the county in which such city is situated, in the name of the city, praying that 'the just compensation to be made for private property to be taken or damaged for the improvement or purpose specified in such ordinance shall be ascertained by a jury.'"

"SEC. 5. Such petition shall contain a copy of the said ordinance, certified by the clerk, under the corporate seal; a reasonably accurate description of the lots, parcels of land and property which will be taken or damaged, and the names of the owners and occupants thereof, so far as known to the board or officer filing the petition, and where any known owners are non-residents of the state, stating the fact of such non-residence."

"SEC. 6. Upon the filing of the petition aforesaid, a summons, which may be made returnable upon any day in term time, shall be issued and served upon the persons made parties defendant, as in cases of chancery. And in case any of them are unknown, or reside out of this state,

the clerk of the court, upon an affidavit being filed showing such fact, shall cause publication to be made in some newspaper printed in his county, or, if there be no newspaper published in his county, then in some newspaper published in this state, containing notice of the pendency of such proceeding, the parties thereto, the title of the court, and the time and place of the return of the summons in the case, and the nature of said proceeding; such publication to be made for four weeks consecutively, at least once in each week, the first of which shall be at least thirty days before the return day of such summons. Notices so given by publication shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by their proper names and had been personally served."

"SEC. 7. Upon the return of said summons, or as soon thereafter as the business of the court will permit, the said court shall proceed to the hearing of such petition, and shall impanel a jury to ascertain the just compensation to be paid to all of such owners and occupants aforesaid; but if any defendant or party in interest shall demand, or the court shall deem it proper, separate juries may be impaneled as to the compensation or damages to be paid to any one or more of such defendants or parties in interest."

"SEC. 8. Such jury shall also ascertain the just compensation to be paid to any person claiming an interest in any lot, parcel of land or property which may be taken or damaged by such improvement, whether or not such person's name, or such lot, parcel of land or other property is mentioned or described in such petition: *Provided*, such person shall first be admitted as a party defendant to said suit by such court, and shall file a statement of his interest in and description of the lot, parcel of land, or other property in respect to which he claims compensation."

"SEC. 9. The court may, upon the motion of such city or village, or of any person claiming any such compensation, direct that said jury (under the charge of an officer of the court) shall view the premises which it is claimed by any party to said proceeding will be taken or damaged by said improvement, and in any case, where

there is no satisfactory evidence given to the jury as to the ownership of, or as to the extent of the interest of any defendant in the property to be taken or damaged, the jury may return their verdict as to the compensation or damage to be paid for the property or part of property to be taken or damaged, and for the entire interests therein."

"SEC. 10. Upon the return of such verdict, the court shall order the same to be recorded, and shall enter such judgment or decree thereon as the nature of the case may require. The court shall continue or adjourn the cause, from time to time, as to all occupants and owners named in such petition who shall not have been served with process, or brought in by publication, and shall order a new summons to issue and new publication to be made; and upon such occupants or owners being brought into court, shall impanel a jury to ascertain the compensation so to be paid to such defendant or defendants, for private property taken or damaged; and like proceeding shall be had for such purpose as hereinbefore provided for the ascertaining of compensation to other owners."

"SEC. 14. Any final judgment or judgments, rendered by said court, upon any finding or findings of any jury or juries, shall be a lawful and sufficient condemnation of the land or property to be taken upon the payment of the amount of such finding as hereinafter provided. It shall be final and conclusive as to the damages caused by such improvement, unless such judgment or judgments shall be appealed from; but no appeal or writ of error upon the same shall delay proceedings under said ordinance, if such city or village shall deposit, as directed by the court, the amount of the judgment and costs, and shall file a bond in the court in which such judgment was rendered, in a sum to be fixed, and with security to be approved by the judge of said court, which shall secure the payment of any future compensation which may at any time be finally awarded to such party so appealing or suing out such writ of error, and his or her costs."

"SEC. 15. The court, upon proof that said just compensation so found by the jury has been paid to the person entitled thereto, or has been deposited as directed by the court (and bond given, in case of any appeal or writ

of error), shall enter an order that the city or village shall have the right, at any time thereafter, to take possession of or damage the property, in respect to which such compensation shall have been so paid or deposited, as aforesaid." (Rev. Stat. Ill., Chap. 24, Art. IX, sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15. 1 Starr & Curtis Stat., pp. 487–91.)

II.

ARGUMENT UPON THE QUESTION OF JURISDICTION AND MOTION TO AFFIRM.

1. *The Supposed Application of the Fifth Amendment to the constitution.*

The assignments of error, so far as they are based upon the fifth amendment to the constitution, are not well taken, for the reason that the fifth amendment has no application to state laws or to the proceedings thereunder. That amendment alone has reference to powers exercised by the United States and not to those exercised by the states. *Eilenbecker* v. *Plymouth County*, 134 U. S., 31; *Thornington* v. *Montgomery*, 147 U. S., 490, 492. This disposes of the question of jurisdiction of the case so far as the jurisdiction is based upon supposed violation of the fifth amendment, as the writ of error herein questions only state laws and judgment.

2. *The Supposed Application of the Fourteenth Amendment.*

We understand that the ground of jurisdiction on which alone the plaintiff relies is the second of the three grounds mentioned in section 709 of the Revised Statutes, viz.: That there was drawn in question, in the judgment of the Supreme court of Illinois, the validity

of a statute of, or an authority exercised under the State of Illinois, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of their validity.

But we maintain that it is clear that the contention of the plaintiff in error herein does not impugn the validity of the statutes of Illinois above mentioned, or the said statutes as construed by the Supreme Court of Illinois, or the authority exercised under the State of Illinois to condemn the use of the property of plaintiff in error by extending the street over its railroad.

The contention of plaintiff in error is this: That the state court erred in laying down a rule for the measure of the compensation or damages to be awarded to the plaintiff in error and a rule of evidence governing the proof bearing upon the amount of such compensation or damage. But that question is one of local law.

Kerr v. *South Park Com.*, 117 U. S., 379, 387.

The determination of that question involves the following questions, which are questions of local law, viz.:

1. The extent of the interest or right, and of the use which the city and public acquire by such condemnation, under the laws of Illinois, in the extension of the street over the railroad of plaintiff in error; and the nature and extent of the use and property right of which the railroad company is deprived by such condemnation. This is clearly a question of local law merely; and the decision of the Supreme court of Illinois thereon is final. That involves no federal question. The court held that the railroad company would not be deprived of its property, but that city only acquired the right to a use jointly

with the continued use remaining in the railroad company. Therefore, the measure of compensation was not the value of the land.

2. The nature and extent and limitations upon the ownership or title of land in Illinois acquired by a railroad corporation organized under the laws of Illinois, and the question of its right, under the laws of Illinois, to use or to change its use of or to sell the land which had been acquired and devoted by such railroad company to certain railroad uses, *e. g.*, to the purposes of a railroad located and built thereon. That, too, is clearly a question of local law upon which the decision of the Supreme court of Illinois is final and not open to review in this court. The court held that the title acquired by thd railroad company and its right to use and change the use and dispose of land so acquired and held by it, were not absolute.

The Supreme court having determined those questions, the court then laid down the rule for the measure of compensation in accordance therewith, viz.: that it was entitled to be compensated for the extent to which the use to which the railroad company had devoted the property (and which the court found was its most valuable use), would be lessened in value by the extension of the street over its tracks, or for the value of so much of this use as would be taken by the city for the street. And the court held that no testimony was offered by the railroad company upon that precise question, and that the verdict was in accordance with such evidence as was introduced upon that subject by the petitioner. This was strictly correct. There was not a particle of the evidence offered by the railroad company and excluded by the trial court which did not ignore the settled principles of the law of Illinois so laid down by the Supreme court.

But if the decision of the Supreme court of Illinois on that question was erroneous, that is not a federal question. It would not make it a federal question to contend or to show that the plaintiff in error, because of such an error of the Supreme court of Illinois on such questions, failed in that case to receive just compensation for its property. So, if the trial and Supreme courts erred in excluding questions to a witness whether the opening of the street would impose upon the railroad company the expense of greater safety precautions involves no federal question. If such errors in the ruling of the Supreme court were demonstrated, that does not show or tend to show that there was drawn in question the validity of the statute of Illinois under which the condemnation proceeding was carried on, or of an authority exercised under the State of Illinois, on the ground of their being repugnant to the Constitution of the United States. The plaintiff in error is seeking to get a further appeal from the decision of the Supreme court of Illinois on the questions decided adversely to it by that court, upon the question of the rules governing the measure of compensation, and the proof thereof, in the cases of the extension of streets over railroads in Illinois, under the laws of Illinois.

There was here undeniably, a trial in accordance with the provisions of the statute under which the proceedings were instituted, before the Circuit court of Cook county, and a jury duly empaneled. The railroad company appeared, presented its evidence and the arguments of its counsel to the court and the jury, and the judgment complained of was based upon a verdict of a jury upon such regular trial. There is not, then, and can not be

any contention that the plaintiff in error has been deprived of its property without ample opportunity to be heard and without a full hearing before the State court. It is not, we think, seriously contended that the statute of Illinois above referred to is in violation of the Fourteenth Amendment, or of any provision of the Constitution of the United States. Of course if it were unconstitutional, there would have been no right to condemn at all thereunder. But it was settled law in Illinois that a defendant admits the right of the petitioner or plaintiff to condemn by filing a cross-petition; and under that state of the law the plaintiff in error filed its cross-petition, herein praying the court to ascertain the compensation. (Print. trans., p. 84, 85,) *Ward* v. *Railway Co.*, 119, Ills., 287, 292. This statute clearly provides for due process of law, and the plaintiff in error in these proceedings had an ample hearing; and the real complaint of plaintiff in error, as we understand it, is that, in these proceedings thereunder, the statute, as *enforced herein*, in some way failed to award sufficient compensation. The state courts adopted a rule upon the question of the measure of compensation or damages to which the railroad company was entitled for the use of its property taken, and the admissibility of evidence to prove damages, which the plaintiff in error conceives was erroneous, and complains that as the *result* of the trial the *amount* of compensation allowed was less than the plaintiff in error was entitled to, or was nominal when it should have been substantial. But if the fact that a defendant fails to get substantial compensation in a condemnation case, or the amount of compensation awarded to a property-owner for property taken for public use is not satisfactory to the property-owner, or is even erroneous, is to be considered a good

reason for a review thereof in the federal court, then it is not perceived why this would not permit the bringing to this court of every case of the condemnation of property in which the property-owner was dissatisfied with the amount of compensation awarded. If this court can review the proceedings in the State court, on the ground that the award of one dollar is too small and is therefore to deprive the property-owner of his property without due process of law, then the same rule would apply if the inadequate award was one hundred dollars or a thousand dollars or ten thousand dollars; and we do not see why, if that door were opened, any disappointed property-owner might not seek a review of the judgment of the State court in this court. But such is not the law. That is not the meaning of the words: "without due process of law" in the fourteenth amendment.

In *Davidson* v. *New Orleans*, 96 U. S., 97, 103–4, Mr. Justice MILLER, after remarking that the provision of the Fifth Amendment restraining the authority of the federal government had been in the Constitution of the United States for nearly a century, and had been rarely invoked before the courts, while the Fourteenth Amendment, which imposes the same restraint upon the power of the states, had been a part of the Constitution only a very few years, and yet the docket of this court was crowded with cases in which the court was asked to hold that State courts and State legislatures have deprived their citizens of life, liberty or property without due process of law, says:

"There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it

would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such decision may be founded."

And the court then proceeds to lay down the following proposition as determining a class of cases which do not fall within the provision of this amendment:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." (96 U. S., 104–5.)

This rule, in the language here laid down by Mr. Justice Miller, has been frequently quoted and approved by this court in later cases, among which we beg to refer to the following: *Hagar* v. *Reclamation District*, 111 U. S., 701, 711; *Walston* v. *Nevin*, 128 U. S., 578, 582; *Lent* v. *Tillson*, 140 U. S., 316, 327.

This pointedly covers the case at bar. Here, at most, as held by the Supreme court of Illinois in this case, and a line of cases, a "burden is imposed upon property for the public use," viz: over the railroad of the plaintiff in error at the point in question a public street is extended. And the public are given the right of passing thereon over said railroad, subject, however, to the right of the rail-

road company to the continued use of the same for its railroad as before. And the laws of Illinois under which such burden is imposed "provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice," with notice to the person; and in the particular suit in which this judgment was rendered, the railroad company was fully heard.

And again, in *Miller* v. *Davidson*, the court lays down this proposition, which expressly applies to the case at bar:

"It is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

In *Kennard* v. *Louisiana, ex rel. Morgan*, 92 U. S., 480, this court, speaking, by Mr. Chief Justice WAITE, of the application of the Fourteenth Amendment, says:

"The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

And again he says:

"From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act.

* * * In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the state."

In *Lent* v. *Tillson*, 140 U. S., 316, the question was whether a statute of California authorizing the widening of Dupont street in the city of San Francisco provided for "due process of law" for the taking of property necessary for that purpose. The statute of Illinois here in question provides quite as if not more effectually for a hearing in which the property owners may participate as did the California statute in question in that case. It was there contended, as it is here, that the act was so *administered* (or *construed and enforced*) by the courts of the state, as to result in depriving the plaintiffs of their property without due process of law; and this is the only real contention here. And upon that the court said:

"It is contended, however, that the act was so *administered* as to the result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question, and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law." (140 U. S., 330, 331.)

It is not contended here that the requirements of the statute of Illinois as to notice, and opportunity of hearing are not adequate, or that they or the statute in other

respects were not carried out. The only contention is that the state courts erred in its rulings upon such questions as the admissibility of evidence or instructions to the jury, or the refusal of a new trial, all of which questions it is not denied were fairly presented to the state court for its determination, and were by it determined upon an adequate hearing of the respondent company's contentions. It is submitted that this case is clearly within the rule laid down by this court in *Lent* v. *Tillson*.

In *Walston* v. *Nevin*, 128 U. S., 578, it was sought to review the judgment of the Court of Appeals of Kentucky in certain proceedings for the levying of special assessments for a local improvement in the city of Louisville, on the ground that they were in violation of the Fourteenth Amendment. But the court sustained the motion to affirm, under rule 6, and quoted the doctrine laid down by Mr. Justice Miller in *Davidson* v. *New Orleans*, 97 U. S., 104, which is above quoted by us.

In *Leeper* v. *Texas*, 139 U. S. 462, 468, it is said by Mr. Chief Justice Fuller, that "law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied." And on writs of error like this such questions as that of the admissibility of testimony arising in the state courts, were matters with the disposition of which this court has nothing to do.

The language above taken from the opinion in *Leeper* v. *Texas* is quoted by Mr. Justice White in *Iowa Central Railway* v. *Iowa*, 160 U. S. 389, 393. And it was there further said that "whether the court of last resort of the state of Iowa properly construed its own constitution and laws in determining that the summary process

under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court."

In *Hurtado* v. *California*, 110 U. S., 516, this court defines "due process of law" as used in the Fourteenth Amendment, in the language of Mr. Webster as "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, prosperity and immunities under the protection of the general rules which govern society."

The judgment here sought to be reviewed fully answers these conditions.

Jurisdiction is not conferred on this court by section 709 of the Revised Statutes to review the judgment of a state court because of errors in that judgment.

The condemnation suit in which the plaintiff in error was summoned, and appeared and urged its contentions, was none the less due process of law, even if the rulings of the state court were erroneous.

The plaintiff in error here cannot claim upon this record that there was drawn in question in this suit, in the state court, "the validity of a treaty or statute of, or an authority exercised under the United States." The laws and the authority involved were state laws and authority only. Nor can it be claimed that there is "any title, right, privilege or immunity" which is "claimed under the constitution, or any treaty or statute of or commission held or authority exercised under the United States." Whatever "title, right or privilege" of the railroad company was asserted or involved in this case was given to it by the law of the State of Illinois; and it neither

claimed nor has any "immunity" from the exercise by the state of the power of eminent domain. Much less is it true that any "immunity" with respect thereto is claimed to exist under federal law.

The case was an ordinary case of the exercise of the soverign right of eminent domain under state law, which is peculiarly a matter of state law and regulation with respect to which, as such, the federal courts or authority have no right of review or concern. The validity of the statutes of the state under which the proceedings were carried on have never been questioned as being repugnant to the constitution of the United States.

The only ground of jurisdiction specified in Section 709 of the Revised Statutes, which the plaintiff in error can point to is, that there was drawn in question "the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the Constitution * * * of the United States." And here plaintiff in error does not claim that the statute in question is repugnant to the constitution; but the statute *as enforced herein by the courts.* But the case of the plaintiff in error does not come within the judiciary act.

When analyzed it is, not that the statute is invalid, but that the court erred in enforcing it; and that there was not "due process of law," because the State court erred in its rulings on questions not of federal law; and as a result of such error the plaintiff was awarded nominal damages by the verdict of a jury and judgment thereon, where it conceives it was entitled to substantial damages.

In such a case errors of the state court, if they have intervened, whatever they may be, provided the plaintiff

in error was given ample hearing therein (and that fact is shown by this record) do not give this court jurisdiction to review the same by writ of error.

Commercial Bank v. *Buckingham*, 5 How., 317, 343.
Railroad Co. v. *McClure*, 10 Wall., 511.
Central Land Co. v. *Laidley*, 159 U. S., 103.
Andrews v. *Swartz*, 156 U. S., 272, 276.
Iowa C. Ry. v. *Iowa*, 160 U. S., 389, 394.

In *Commercial Bank* v. *Buckingham*, 5 How., 317, 343, the court, speaking by Mr. Justice GRIER, says:

"It is the peculiar province and privilege of the state courts to construe their own statutes; it is no part of the functions of this court to review the decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

This is quoted and approved in the late case of *Central Land Co.* v. *Laidley*, 159 U. S., 103.

In *Railroad Company* v. *McClure*, 10 Wall., 511, certain municipal bonds had been issued by the County of Washington, in the State of Iowa, at a time when the constitution of the State of Iowa, as construed by its Supreme court, authorized such issue. But later, after these bonds were issued and disposed of, the Supreme court of Iowa changed its ruling as to the construction in this respect of the constitution of the state, and decided that the bonds so issued were unauthorized by the constitution, while, on the other hand, this court in the *Gelpcke Case*, 1 Wallace, 75, sustained the validity of the bonds

on the ground that the holders thereon were protected *by the federal constitution* against such change in the construction of the constitution of the State of Iowa, this court holding that if a contract, when made, is valid by the laws of the state as laid down and administered in its courts of justice, its validity cannot be impaired by subsequent decision altering the construction of the law. A writ of error was sued out to this court in *Railroad Co.* v. *McClure*, *supra*, from the Supreme court of Iowa to review its later decision on the ground that thereby the obligation of the contract was impaired, and there was therein drawn in question the validity of the statute or authority or existence under the statute as being repugnant to the constitution of the United States. That was a case where the obligation of a contract was impaired by the laws of the State "as construed and enforced by the Supreme court." But this court held that it was without jurisdiction of such writ of error under the judiciary act: that the question of the validity of the bonds was not one of Federal jurisdiction; and that the question there involved is not within the category of questions the jurisdiction of which is conferred upon this court upon a writ of error from the Supreme court of the state by the judiciary act. The writ of error was dismissed for want of jurisdiction. In other words, the holding was in effect that an erroneous decision by the Supreme court of a state, even upon the construction of the state laws, does not give to this court jurisdiction to review the decision, although the effect must be to deprive the plaintiff in error of his property without compensation, or invalidate a contract.

This is followed by the decision of this court in *Central Land Co.* v. *Laidley*, 159 U. S., 103, in which Mr. Jus-

tice GRAY carefully distinguishes between a contract being impaired or a person deprived of his property by an act of legislature and by a decision of the judicial department of the state, and holds that in the latter case a writ of error does not lie, and says:

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."

The decision of the state court which was claimed to be erroneous in that case and to have the effect to deprive the plaintiff in error of his constitutional rights was upon the construction of the laws of the state. In other words, it was a case (as much as the plaintiff contends the case at bar to be) where the party was deprived of his constitutional rights by the laws of the state "as construed and enforced by the Supreme court of the state." But the plaintiff in error cannot impose the alleged error of the court upon the statute of the state in that way.

In *Railroad Co.* v. *Bristol*, 151 Ill., 556, 570, this court, speaking by Mr. Justice FULLER, says:

"We are asked upon the grounds above indicated, to adjudge that the highest tribunal of the state in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the state of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

"But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

"As observed by Mr. Justice MILLER in *Davidson* v.

New Orleans, 96 U. S., 97, 104, the Fourteenth Amendment cannot be availed of 'as a means of bringing to the test of the decision of this court, the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' To use the language of Mr. Justice FIELD *Missouri Pacific Ry.* v. *Humes*, 115 U. S., 512, 520, 'it is hardly necessary to say, that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures.'"

The cases cited by the learned counsel for plaintiff in error to the point that the protection extended by the Fourteenth Amendment againstd epriving the plaintiff in error of its property without due process of law extends to the action of the State through its judicial department, as well as its legislative or executive, have no application to the case at bar. In many of them the validity of a federal statute or rights under acts of Congress were involved, such as the right to remove the case into the Federal court, or rights under the Civil Rights acts, or question of discrimination on account of color or denial of the equal protection of laws was plainly presented. In not one of them is there any support for the contention that, under section 709 of the Revised Statutes, a writ of error lies to this court to review the judgment of the Supreme court of a state, as not being "due process of law," in a case regularly brought and prosecuted therein involving merely questions under the laws of the state such as the exercise of the right of eminent domain, where the court had jurisdiction of the subject-matter and the parties, and where the plaintiff in error was fully heard therein, and where the complaint is that the state court laid down erroneous principles or rules of law governing the measure

of just compensation to be awarded under the constitution of the state, and the manner of proving the same.

Put to it by the stress of his case, the learned counsel for the plaintiff in error gives a definition of the purposes of the Fourteenth Amendment, which, if it were correct in its full extent, and as here applied by him to the judicial departments of the states, would make it very difficult to deny the jurisdiction of this court of a writ of error to review the judgments of the courts of a state in any case involving life, liberty or property, and would leave nothing of the sovereignty of the states.

After saying correctly that the Fifth Amendment "imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen," the learned counsel says:

"They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States where thus left without adequate protection and security in their persons and property. The Fourteenth Amendment was adopted to remedy and correct this defect in the supreme organic law of the land.

It involves no forced or unreasonable construction to hold that this Fourteenth Amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the Fifth Amendment had placed upon the authority of the Federal government."

The position of the learned counsel for the plaintiff in error here is a striking example of what Mr. Justice MILLER remarked upon in *Davidson* v. *New Orleans*, as above quoted by us:

"There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment In fact, it would seem, from the character of many of the cases be-

fore us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such decision may be founded."

The learned counsel for plaintiff in error has cited ample decisions of the courts of last resort of the states that it is a fundamental principle *of the law of their states* that private property cannot be taken for public use without compensation, even if not so expressed in the constitution of the state.

If the Fourteenth amendment had the purpose, as contended, of enacting for the states the provisions of the Fifth Amendment, it was useless because that was already from the beginning a fundamental principle of the state institutions and laws as the learned counsel shows.

The Fourteenth amendment was not intended, as the learned counsel erroneously conceives, to protect a citizen of a state in the protection or rights *given to him by the laws of his state* against any apprehended deprivation of such protection or rights by the merely erroneous judgments with respect thereto of the highest court of his state, in cases where such court had jurisdiction of his person and the subject-matter, and where he was fully heard therein.

III.

AS TO THE CLAIM OF UNJUST DISCRIMINATION AND DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

"There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike." *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S., 566, 571.

In *Missouri Ry. Co.* v. *Mackey*, 127 U. S., 205, 209, the court say, and this is applicable to the case at bar:

"The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, * * * are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is speciat in its character; if in conflict at all with that clause, il must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

To same effect is *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S., 512, 523, and *Walston* v. *Nevins*, 128 U. S., 578.

There is no contention that any different rule is applied to one railroad than to another railroad either under the statutes or under the course of decision in Illinois with

respect to the matter of extending streets across the same. It cannot be contended that there must necessarily be the same rule or measure of compensation to a railroad company for the extension of a street across the railroad, where the railroad and the entire use thereof is still left in the railroad company, as applies to the case of the taking of private property of the individual for the purposes of a public street where the owner is deprived of his entire use and enjoyment. The conditions are entirely unlike.

IV.

THE DECISION OF THE SUPREME COURT OF ILLINOIS IS SUSTAINABLE ON GROUNDS ENTIRELY OF STATE LAW AND NOT INVOLVING ANY FEDERAL QUESTIONS.

An examination of the opinion of the Supreme court of Illinois will disclose that the case is decided on grounds not involving any federal question within the rule laid down by this court in *Beatty* v. *Benton*, 135 U. S., 244; *Marrow* v. *Brinkley*, 129 U. S., 178; *Hale* v. *Akers*, 132 U. S., 554; *San Francisco* v. *Itsell*, 133 U. S., 65; *Hopkins* v. *McClure*, 133 U. S., 554, and other cases.

The decision by the Supreme court of Illinois involved or concerned no other questions than the following, all of which are questions of state law, and none of them are or can be made federal questions, viz.:

1. The duty of the State of Illinois, and of the City of Chicago, as an agency of the state, to provide convenient highways, and the nature and extent of such duty; and the principle that this duty is a legislative or governmental duty, and that the question of the necessity of its exercise is a legislative question.

2. The question whether the amount awarded as just compensation in a case regularly prosecuted in accordance with the laws of the state, and in which all the parties in interest are given a full hearing, was just compensation under section 13 of article 2 of the constitution of Illinois, which provides that private property shall not be taken for public use without just compensation — the compensation, when not made by the state, to be ascertained by a jury, as shall be prescribed by law.

The principle that private property shall not be taken for public use without just compensation, under the laws of eminent domain of a state, is not provided for in the constitution of the United States. It is expressly provided for in the constitution of the State of Illinois. And if it had not been there provided, then, as shown by the authorities cited by the learned counsel for the plaintiff in error, it is a fundamental principle of the constitution, laws and institutions of the state. It is not a fundamental principle of the law of the United States except as expressed in the Constitution of the United States. The United States has no principles of Magna Charta or common law as a portion of its system.

Wheaton v. *Peters*, 8 Peters, 591.
Pennsylvania v. *Wheeling Bridge Co.*, 13 How., 564.

By the Fifth Amendment this principle was embodied in the Constitution as governing the federal authorities.

But as applicable to the acts of the state authorities, this protection is secured by the law of the state. The protection of the Fourteenth Amendment of the Constitution of the United States, that no state shall deprive a person of property without due process of law,

does not enact for the states that which was already a fundamental law of the states, that the property of the citizen shall not be taken without just compensation. Plainly, the determination by the state court that, under the laws of the state, the amount awarded by the jury in this case was just compensation, is a binding determination of State law and does not involve the Fourteenth Amendment where the judgment was in the regular course of judicial proceedings according to the laws of the state, in which all the parties were fully heard.

3. The decision of the Supreme court of Illinois, herein involved the further question of the character of, and the limitations upon, the ownership, under the laws of Illinois, of a railroad in Illinois, and of the land situated in said state which has been acquired and devoted to the purposes of a railroad, by a railroad company organized under the laws of that state; and of the limitation under such laws upon the uses of such property by such corporation; and the limitations under such laws of the right of such railroad company to change such uses or to dispose of such property without legislative consent.

4. Also the question as to the nature and extent of the governmental or police power of the state, under its laws (which enter into the rule of property applicable to railroads in Illinois, or subject to which the railroad company accepted and holds its corporate franchises and acquired and holds its railroad property here in question) over such railroad property and its uses, so far as the same is applicable to the issues in the suit at bar and to the question therein of the measure of the just compensation to be paid to the railroad company under the Constitution of Illinois for extending a public street over such railroad.

5. The question whether certain alleged elements of compensation were proper elements of compensation, in view of the rulings of said court upon the foregoing questions.

These questions were decided by the Supreme court of Illinois, as questions of local law; and it is plain that there was no question of federal law decided by the court. (Pr. Trans. 90, 92.) These questions are questions of local law; and such questions being decided, the decision disposes of the entire case. But if any of these questions were questions of general law and not of federal law, and the case was disposed of by the decision of them, this court has no jurisdiction.

Marrow v. *Brinkley*, 129 U. S., 178, 181.
San Francisco v. *Itsell*, 133 U. S., 65.
Hopkins v. *McClure*, 133 U. S., 380.
Beatty v. *Benton*, 135 U. S., 244.

V.

The decision of the supreme court of Illinois was not erroneous but was correct.

It is settled law that railroads are public highways.

Cherokee Nation v. *Kansas Ry.*, 135 U. S., 641, 657–8.
Union Pacific Ry. v. *Chicago, etc. Ry.*, 163 U. S., 564, 585.
Constitution Ill., Art. 11, Sec. 11.

It is settled law that it is a governmental duty to provide safe and convenient highways for the public. It is this *same governmental duty* which is observed in the opening of public highways and public streets in cities, and in the provision for the construction of railways by

the grant of charters to corporations therefor, and conferring upon them the sovereign power of eminent domain.

In *C., B. & Q. R. R.* v. *Atty. Gen. of Iowa*, 9 Western Jurist, 347, in the Circuit court of the United States, DILLON, J., says:

"In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the state or community is considered a governmental duty. This may be done with the government, directly or through the agency of corporations created for that purpose. The right of public supervision and control over public highways results from the power and duty of providing and preserv-preserving them. And as to ordinary highways these propositions are unquestioned; but it is denied that they apply to railways built by private capital and owned by private corporations created for the purpose of building them. Whoever studies the nature and purpose of railways constructed under the authority of the state by means of private capital will see that such railroads possess a twofold character. Such a railway is in part public and in part private. Because of its public character, relations and duties, the judicial tribunals of this country, state and national, have at length settled the law to be that a state to secure the construction, may exert in favor of the corporation authorized by it to build the road, both its power of eminent domain and of taxation. This the state cannot do in respect to occupations or purposes private in their nature. * * * Over the railway as a highway, and in all its public relations, the state, by virtue of its general legislative powers, has supervision and control; and over the rights of the shareholders, so far as these are private property, the state has the same power, and no greater than over other private property."

In *Railway Co.* v. *Railroad Co.*, 97 Ill., 516, the court, speaking of railways, says:

"In so far as such property is to be regarded as public property or devoted to public use the general assembly may consent, in behalf of the public, that the character of the use may be so changed. In so far as the private rights of the railway company in such property are concerned, such rights like other private property are subject to the power of the state to condemn and take for the new use, upon payment of the just compensation."

In *Georgia Banking Co.* v. *Smith*, 128 U. S., 174, 179, this court says that the grant to a railway company of special privileges to carry out the objects of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property,—a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains; and that this is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. The court further said that there have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions in which some kinds of property or business may be properly held to be thus affected, as in *Munn* v. *Illinois*, 94 U. S., 113, 126, 139, 146; but none as to the doctrine that when such use exists, the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression.

In *Charlotte, &c., R. R.* v. *Gibbes*, 142 U. S., 386, 393, the court says that railroad companies, being recipents of special privileges from the state, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation.

The law is well settled that a railroad company takes its charter originally subject to the general law of the state and to such changes as might be made in such general law, and subject to future constitutional provisions, or future legislation. Nor will the exemption claimed from future general legislation, either by constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words.

Penn. Railroad v. *Miller*, 132 U. S., 75, 83, 84.

In *Railroad Co.* v. *Bristol*, 151 U. S., 556, 557, this court says :

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States in the impairment of the obligations of contracts or the deprivation of property without due process of law or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

And further the court said :

"The conclusions of this court have been repeatedly announced to the effect that though railway corporations

are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; * * * that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

In *Railroad Co.* v. *Kentucky*, 161 U. S., 677, 695–6, this court says:

"While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests. * * * It has been too often held that railways were public highways, and their functions were those of the state, though their ownership was private, and that they were subject to control for the common good, to be now open to question."

And it has been uniformly held in this court that railway companies are not entitled to compensation for obedience to valid regulations enacted by the state under the police power. Clearly, then, additional precautions, on the part of railway companies made necessary by the

growth and expansion of cities; the increase of population; and the necessary extension of new streets and highways over the same for the public good in obedience to the governmental duty in that respect, are properly among such uncompensated requirements of railway companies. By this very expansion and growth of cities upon their lines, the railway companies receive corresponding benefits.

It is, therefore, clear that the fact that the railway company, plaintiff in error, may be compelled, by reason of the extension of this street over its railroad, to submit to some inconvenience in the conduct of its own business, or to take additional precautions in order to operate its road with safety, or in obedience to police regulations which exist or which may be enacted, does not give the railway company the right to claim compensation therefor either as compensation for the *taking* of its property for the extension of the street or for damages to its property not taken. That question in this case was a question of local law. And if a question of general law, it was correctly decided; and even if the ruling were not in consonance with the opinion of this court, it involves no federal question.

The governmental or police power over railroads devoted to public use is much more extensive and broader than the police power over private property of the citizen. Railway companies are certainly as subject to police power as owners of private property are subject thereto. But they are also subject to regulations as public highways and as public agencies.

In *I. C. R. R.* v. *Willenborg*, 117 Ill., 203, the court held that this power extended to compelling a railroad company to construct a farm crossing at its own expense.

In that case the court, speaking of this legislative power over railroads, says:

"The point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossing for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed. They have reference to the public security both as to persons and to property. All property devoted to public uses takes on a nature of qualification *quasi* public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizen is not subjected. Rights purely and exclusively private, in nowise affect others, and in no way affecting public morals, are not regarded as being within the control of the public power; nor can mere private property be taken for public uses without making to the owner just compensation; yet the law has always required the citizen to use his property as not to unnecessarily injure another, and, to compel the observance of that rule, even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or a corporation, becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquires such a qualified interest as will subject it to the legislative control for the common welfare. Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed on the owners of mere private property, used purely and exclusively for private interests. The distinctions in this regard have been uniformly observed. It is for this reason it has been frequently held that railroad corporations, notwithstanding that no such right had been reserved in their charters, may be required to fence their track, to put in cattle-

guards, to place upon their engines a bell, and to do many other things for the protection of life and property. No public exigency has ever made it necessary to impose such burden upon the citizen exercising no functions or occupations in their nature public or *quasi* public. Railroad companies are public corporations in a limited sense, although the right of way, the road-bed, and the track thereon, are for the exclusive use of the owners over which only their own conveyances are propelled. All others are excluded. The traffic, however, on railways, bears no analogy to our notions of travel on an ordinary street or highway. The uses are totally different, and even inconsistent. The one is exclusive in favor of the owner, and the other is open and free to all. The common use of railroads by the public could not be otherwise than dangerous. It is for that reason their use is restricted to the owner. The fact railroad corporations are granted exclusive franchises to conduct a business in its nature public, must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law, that railroad corporations are within the operation of all reasonable police regulations, otherwise there would be no security for the life or property of the citizen residing in the vicinity."

In *Railway* v. *Commissioners*, 79 Me., 394, this same principle is laid down, that such governmental power over railroads as public highways is broader and more extensive than police power over private property of the citizen; and the principle is applied to a case like this, to an extension of a street over a railroad.

In *Railroad Co.* v. *Railway Co.*, 105 Ill., 405, Mr. Justice SCHOLFIELD says :

"The development of the country, its material prosperity, and even the comfort and convenience of the citizens, render it necessary that railroads should be built and operated in every direction, and so necessarily, often times crossing each other. And this necessity has always been so obvious that it can never be presumed that the legislature has bound its hands in regard to it, by con-

tract in the nature of a grant, in the absence of unmistakable language, to that effect, if even then it could be held to have done so, for it would in effect be parting with one of its sovereign rights, which is indispensable to the welfare of the state.

"Where villages or cities spring up along the lines of railways, and their streets are laid out across the railway tracks, the care and labor to avoid collision is materially increased, and the speed of trains must, of necessity be to some extent slackened. In all these cases, if the railroad charter is held to amount to a contract that passage upon its line of its railway shall not be delayed, hindered or burdened, the highways and streets cannot lawfully be laid out until the railroad company is compensated for the additional burden it will thus have to bear. * * * This has never been supposed to be the law.", etc.

In *Railway Co.* v. *Railway Co.*, 30 Ohio St., 604, 618,

the court say:

"Every railroad corporation line takes its right of way subject to the rights of the public to have constructed their highways across it when necessary, in the same manner as it is subject to taxation or to reasonable regulations in the mode of using this property."

In *Railway Co.* v. *Brownell*, 24 N. Y., 345, 349, the court held an act of the legislature, authorizing the laying out of highways across railroad tracks without compensation, valid, and say:

"But the statute declares that the highway may be laid across the track without compensation to the corporation owning the railroad. This, it is argued, is repugnant to the constitution, as the taking of private property for the use of the public without recompensing the owner. Upon this my opinion is that the railroad companies, under the general act, did not acquire the same unqualified title and right of disposition to the real estate taken for the road, and paid for according to the act, which individuals have in their lands. The statute

declares the effect of the proceedings which it authorized to be that of the company 'shall be entitled to enter upon, take possession of and use the said lands *for the purpose of its incorporation* during the continuance of its corporate existence; and it further declares that the land which it thus appropriates shall be deemed to be acquired for public use. The title to the land being thus limited to its use for the purpose of a railroad enterprise, it is necessarily subject to the exercise of all these powers reserved to the legislature, to which the franchises of the corporation are subject."

If the public travel requires new or improved facilities, it is the duty of the public servants to make them or allow them to be made. In this respect the railway company is a public servant, and this duty on the part of the public authorities to provide streets, is a well known condition upon which the railway company took its charter.

Salem & Co., etc., v. *Town of Lyme*, 18 Conn., 451.

The question of the extension of public highways or streets over a railroad, and the question of one railroad crossing another, are entirely different. The new railroad has contributed no benefits to the railroad crossed. But it is different as to the public highway. Railways are granted by the public numerous important and valuable rights which are adequate compensation for the duties which it performs and concessions from it for the public good. These rights are granted to it by the government in observance of the same public duties as the laying out of other highways. The railway crosses the public highway without compensation to the city, town or county, which paid therefor; it crosses navigable streams, and it is given the sovereign power of eminent domain; and other valuable privileges are ac-

corded to it, and public rights and public property, which are not given to individuals or private corporations. *Railway Co.* v. *Deering*, 78 Me., 61-68.

The use of its railway by a railway company is solely a public use. It is the *use* that is alone involved in the extending of a street across the railway. The inconvenience, if any, which the railway company experiences from the extension of the street, are inconveniences in its public use. It is not deprived of its property. It still has its property.

The right of railway companies to fix their own rates is as much a right of private property as the right to determine what use shall be made of their railroad. Indeed, the element of private right or private property in railway companies and their property and business, as distinguished from matters of public right or public property, is the right of the shareholder in the profits from their rates. It is these revenues alone from which the shareholder gets his returns, and which give value to his shares. The power to regulate the rates which shall be charged by railway companies is much more clearly an interference with the rights of private property of the shareholders than the power to regulate the public use of the railroad by the extension of a street over the tracks of the railway company which are devoted to public use. This merely affects a strictly *public* use of the railway as a *public* highway, and for the common good permits a more extended use—a public use more consistent with the public necessities and welfare, without taking away or seriously interfering with the existing public use by the railway company.

These principles were all proper and important in the consideration of this case by the Supreme court of Illi-

nois. And "the adjudication of the highest court of a state, that in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

Railroad Company v. *Bristol*, 151 U. S., 556, 571.

It has been universally held in this court that railway companies are not entitled to compensation for obedience to regulations enacted by the State under the police power. Clearly additional precautions on the part of the railway companies made necessary by the growth and expansion of cities; the increase of population; and by the necessary extension of new streets and highways over the same for the public good in obedience to the governmental duty in that respect are properly among such uncompensated requirements of railway companies. By this very expansion and growth of cities upon their lines, the railway companies receive corresponding benefits. Moreover, the changing necessity of such precautions; the uncertainty as to what will be required by the conditions or by changeable police regulations of the state, make this too conjectural to form a basis of compensation, if otherwise it were proper.

It is therefore clear that the fact that the railway company, plaintiff in error, may be compelled, by reason of the extension of this street over its railroad, to submit to some inconvenience in the conduct of its own business, or to take additional precautions, in order to operate its road with safety, or in obedience to police regulations which exist or which may be enacted, does not give the railway company the right to claim compensation, either

for the taking of its property for the extension of the street or for damages to its property not taken. That question in this case was a question of local law; and the decision of the Supreme court of Illinois in respect thereto involves no federal question even if the question was one of general law. The rule of the Supreme court upon this question is settled law in that state.

C. & N. W. Ry. Co. v. *City of Chicago*, 140 Ill., 309.

I. C. R. R. Co. v. *City of Chicago*, 141 Ill., 586.

I. C. R. R. Co. v. *City of Chicago*, 138 Ill., 453.

Ry. Co. v. *Ry. Co.*, 105 Ill., 110, 117.

Railroad Co. v. *Loomis*, 13 Ill., 448.

Railroad Co. v. *Dill*, 22 Ill., 264.

Railroad Co. v. *Appleby*, 18 Ill., 283.

Railroad Co. v. *McClelland*, 25 Ill., 140.

Railway Co. v. *Railway Co.*, 105 Ill., 110.

I. C. R. R. Co. v. *Wittenborg*, 117 Ill., 203.

And this rule is sustained by the weight of authority.

Boston & M. R. R. v. *County Commrs.*, 79 Me., 386.

Thorpe v. *R. R. Co.*, 27 Vt., 150.

Ry. Co. v. *Ry. Co.*, 30 Ohio St., 604.

R. R. Co. v. *Deering*, 78 Me., 61, 70.

Mass. Central R. R. Co. v. *Boston R. R. Co.*, 121 Mass., 124.

State v. *Chicago, etc., Ry. Co.* (Neb.), 45 N. W. R., 469.

N. Y., etc., Ry. Co. v. *Waterbury*, 60 Conn., 1.

Charlotte, etc., R. R. v. *Gibbes*, 142 U. S., 393.

The decision of the Supreme court of Illinois was not erroneous.

Respectfully submitted.

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WILLIAM G. BEALE,
For Defendant in Error.

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SUPREME COURT, U.S.
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166-226

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD CO.,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

Nos. 129 and 130.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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BYRON S. ADAMS, PRINTER.

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Nos. 129 and 130.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The main contention of counsel for defendant in error is, that the statute of the State governing condemnation proceedings provided a method for ascertaining the compensation to be made for the property to be taken; that the proceeding which resulted in the judgments in the cases before the court were taken under this statute; that the parties had a hearing, etc., and that the action of the State court proceeding under this statute, whatever the judgment and however wrongful, was "due process of law."

1. Counsel do not controvert either of these two propositions of our brief: (1) That the prohibitions of the Fourteenth Amendment extend to any action of the State, and therefore, include any taking of private property, without due process of law, or any denial of the equal protection of the laws, whether by the legislative, executive or *judicial* departments. (Brief for plaintiff in error in No. 129, pp.

17–24.) (2) That the taking of private property by the State *without compensation*, is not "due process of law," that the making of compensation for the property taken is a necessary condition of any exercise of the power, and that, therefore, any taking which does not make this compensation, is not "due process of law." (Brief for plaintiff in error, pp. 34–50.)

It would seem to follow, from these two uncontroverted propositions, that a judgment of a State court (as directly within the prohibition of the Fourteenth Amendment, as an act of legislature) which under the undisputed facts, takes private property of substantial value and appropriates it to a public use on payment of the nominal sum of $1, and therefore, without compensation, in fact or in law (Brief, pp. 50–56), is not "due process of law."

The argument of counsel is that the law of Illinois, having provided a mode of procedure *for ascertaining the just compensation* to be made the owner, and for the payment of such compensation before the property is taken, and the owner having been heard in due course by the court before which the proceeding was brought, the wrong done results from an error in decision by the court and not from want of due process.

This argument ignores the fundamental and undisputed fact that the judgment itself—the very process by which the property is *taken*—the judgment of condemnation—does not provide for compensation at all, but provides for and authorizes the taking of the property, *without compensation*, either in fact or law, and thus omits the essential element and condition of due process of law for the taking of private property—the making of compensation to the owner.

One of two conclusions follows—either the statute providing for the procedure authorized a judgment, taking the property without compensation, or it has been so *administered*

by the court, the judicial department of the State, charged with the duty of administering it, that the property is in fact taken without compensation. In either case, the result is the same, the taking of the private property by the State, without the compensation, which is an essential condition of the exercise of the power of eminent domain, and without which there was not the "due process of law" intended by the Fourteenth Amendment.

It is settled, by repeated decisions of this Court, that a statute which on its face may not be obnoxious to the objection, that it denies the particular right secured by the Constitution, may be so *administered* as to result in a denial of the right, and that in such case, the action of the State officers in the *administration* of the statute is as obnoxious to the constitutional provision as if the statute, instead of recognizing, had in terms denied the right.

As we have seen, the prohibitions of the Fourteenth Amendment are against the action of the State, whether acting through the legislative, executive or *judicial* department, and any action of the State which denies or takes away any right protected by this provision, whether by the legislative department in enacting a statute or the judicial department in the method of its enforcement, is equally within the prohibition.

No matter what previous steps may have been taken in the proceeding, or however regular the proceeding was in its inception, the fact remains, that the judgment of the Court which constituted *the taking* condemned the property and appropriated it to the public use, *without compensation.*

We have shown in our brief, and counsel do not controvert, that the legal fiction of *nominal* damages has no place in condemnation proceedings, which are for the purpose of ascertaining the amount of the compensation to be made—the *actual* damages—for the taking of private property—

and that the judgments in the cases before the Court are, therefore, the same, both in fact and in law, as if the allowance of the nominal amount of $1 was wholly omitted from them. (See Brief, pp. 54–7.)

2. The argument of counsel is in effect that the *Legislature* did not authorize the taking of the property without compensation, because it provided a mode of procedure for ascertaining compensation to be paid before the property was taken, and that *the court*, which entered the judgment condemning and appropriating the property to the public use, did not take the property without "due process of law," because in entering the judgment for the taking *without compensation* it was acting judicially under the statute.

The result of this argument is that, by the combined action of the legislative and judicial departments, the State can, in effect, take the private property of a citizen, without making the compensation, which, as we have seen, is an essential element or condition of "due process of law." In other words, the argument is that, while an act of the Legislature, omitting any provision for such compensation, or a judgment of a court omitting it, would not be "due process of law," the State, by the combined action of the legislative and judicial departments, the one providing a mode of procedure, which in form provides for ascertaining compensation and its payment, and the other, administering that procedure, by entering a judgment for the taking *without compensation*, could in fact take the property without compensation, and thus defeat the constitutional provision.

The effect of this reasoning would be to take the judicial department out of the prohibition of the amendment and make it binding only on the legislative department, contrary to the repeated express decisions of this Court. It would only be necessary that the Legislature should provide

a *mode of procedure* for ascertaining the compensation, and thereupon the judicial department could, by giving some construction to the statute, which would in fact nullify it, or ignoring its provisions on some legal fiction, such as awarding *nominal* damages, take away in effect the constitutional right to compensation for the property taken, under forms of law which would omit the essential element of "due process of law"—compensation for the property taken.

3. In all the cases cited by counsel, in support of their contention, the rulings of the State court, which this Court was asked to review, were either decisions on questions of *fact* on which the Federal right depended, or rulings on questions of general or local law which did not in themselves or in the judgment rendered involve a Federal question. The general language quoted by counsel from some of these cases should be read in connection with the facts.

Most of them were tax cases in which the claim was that the particular assessment was unjust or unequal, involving questions of fact. But even in these cases the court recognized that the action of the State authorities might be so grossly arbitrary or outside the statute on the facts as to amount to a denial of a Federal right.

(See Lunt *vs.* Tilston, 140 U. S., at 331.)

The cases of Scott *vs.* McNeal, 154 U. S., 34, and Neal *vs.* Delaware, 103 U. S., 370, sustain and apply the rule of decision we invoke. In both of these cases there was a trial and other procedure in due course in the State courts, and both State courts placed their decisions, which this Court reversed, on grounds of procedure and general law which did not deny the Federal right.

4. In any view, it must be an essential feature of the rule which counsel invoke, as applicable here, that where a mode of procedure is provided by the State, and there is a trial

and judgment by the court proceeding under it, this procedure will constitute "due process of law;" that *the statute which provides the procedure shall be followed.*

Turning to the statute, as quoted in the brief of counsel, we find it expressly provides, that the petition to be filed shall be a petition praying that "the just compensation to be made" "shall be ascertained."

Section 7 further provides that the court shall proceed to a hearing of such petition and shall impanel a jury "to ascertain the just compensation to be paid."

Section 14 provides that "any final judgment or judgments rendered by said court" shall be "a final and sufficient condemnation of the property to be taken, upon the payment of the amount of such finding as hereinafter provided."

Is it not clear that any judgment assumed to be entered in a proceeding begun under this statute, which provides for the taking and appropriation of the property for the public use *without compensation*, would not be authorized by the statute, but would be in fact contrary to its manifest intention.

In Lunt *vs.* Tilston, 140 U. S., at p. 331, in which the doctrine invoked by counsel was applied under a statute providing for the issue of bonds, and an assessment for their payment, etc.; the Court says: "whether a larger amount of bonds was issued than should have been, the excess, if any, *not being so gross as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute,*" is an issue which does not present a Federal question.

It is clear from this language, as must be the case on principle, that even in cases where the doctrine applies any action of the State authorities purporting to be under and in pursuance of the statute, but contrary to its manifest intention, would not be "due process of law."

It is also laid down by the very authorities cited by counsel, that even in the cases to which the doctrine applies, the proceedings by the State court must be such that the court had jurisdiction to do what it did do under the statute.

However regular the petition, under which the proceedings were begun, may be, it cannot be contended that the statute gave the court, proceeding under it, jurisdiction to condemn private property *without compensation*, and to enter a judgment accordingly. Such judgment would be contrary to both the language and manifest intention of the statute and would therefore be without jurisdiction.

Nor can it be justly said that if the trial court by its rulings in admitting and excluding evidence left the jury no course but to render a verdict for nominal and not actual compensation for property of admittedly substantial value, and in which the respondent had an actual and substantial interest, the action of the court would be within the intention of the statute.

5. The argument is also put in this form by counsel: That the State court had *jurisdiction* to hear and determine the questions; that plaintiff in error had its hearing before that court on the questions, and that the State court, having given judgment against it in the exercise of its jurisdiction to hear and determine, only alleged errors of the State court are involved, and that this Court will not sit to review alleged errors of State courts.

The argument, as thus stated, ignores the plain distinction recognized and affirmed by repeated decisions of this Court between cases brought from the highest courts of the State by writ of error, in which the judgment of the State court only involved alleged errors by the court, in determining general questions of law or fact, and cases in which the judgment of the State court involved Federal questions.

In all this latter class of cases the primary question is whether there is a Federal question, and if the case presents such a question, this fact gives to this Court jurisdiction, not to determine whether or not the judgment of the State Court *is void for want of jurisdiction* (which would require no writ of error), but to review the judgment and pass upon the errors assigned.

The very office of the writ of error to a State court is, to bring up the judgment of that court for review in this Court, and the question involved in such writ is not whether the State court had jurisdiction to render the judgment, but whether it *erred* in rendering it.

If the Federal question grows out of an asserted denial of a right given by the Federal Constitution, as in this case, a judgment taking private property without "due process of law"—that is, without compensation—if this court has jurisdiction at all by writ of error, it is to review the *errors* of the State court which resulted in this denial of the right claimed under the Federal Constitution.

The case *In re* Wood, 140 U. S., 278, in which a *habeas corpus* was sought on the ground that the judgment deprived the prisoner of a right claimed under the Federal Constitution, and the writ was denied, proceeds on the precise ground that the State court had jurisdiction to render the judgment, and in doing so, to determine the Federal question, and that, therefore, the appropriate remedy was by writ of error from this Court to the State court, to review the errors of the State court, and not by *habeas corpus*.

The Court says:

"If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general seesions, and erroneously decided against the appellant, such error in decision

would not have made the judgment of conviction void, or his detention under it illegal. (Savin, Petitioner, 131 U. S., 267, 279; Stevens *vs.* Fuller, 136 U. S., 468, 478.) Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of *habeas corpus*, to review the decision or disturb the custody of the accused by the State authorities. The remedy in such case, for the accused, was to sue out a writ of error from this Court to the highest court of the State, having cognizance of the matter, whose judgment is adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws of the United States, could have been re-examined and reversed, affirmed, or modified by this Court, as the law required."

See also Gibson *vs.* Miss., 162 U. S., 579, and Brief, pp. 32–34.

The argument of counsel comes to this—that, where it is claimed, as here, on writ of error to the State court, that the effect of the judgment was to deny to the plaintiff in error "due process of law"; if it is shown that the State has provided by law for a hearing and determination of the different questions involved in this claim by a judicial tribunal, and the plantiff in error has been heard in the State court on those questions, the decision is conclusive on this Court.

This argument proves too much and is contrary to the express decisions of this Court in analogous cases.

Thus, in Scott *vs.* McNeal, 154 U. S., 34, the action was ejectment—one of the recognized modes of procedure for the trial and adjudication of questions of title—and one of the grounds on which the jurisdiction of this Court was denied, was that Scott had had a hearing and trial in the State court; that the rulings complained of were made by that court in due course of proceedings, which provided a mode of trial, etc., and that the writ of error only brought up alleged errors of the State court on questions of the admis-

sibility of evidence made in the progress of the trial and expressly placed by both the trial and supreme courts of the State on grounds which involved the construction of a local statute and general questions of law. But this Court, on writ of error, bringing up the final judgment in ejectment, reviewed these rulings in the progress of the trial, and held that they were erroneous, and that the effect of these rulings and the judgment based upon them was to deprive Scott of his property without "due process of law," and for that reason reversed the judgment in ejectment and awarded a new trial in the case.

So here the contention is, that because the State court has decided in due course of the procedure provided by the State law, that plaintiff in error was entitled to *no compensation* for its property taken by the judgment of condemnation, thereby denying to it the fundamental right to compensation for its property, this determination is conclusive on this Court. The necessary effect of this is, as we have seen, to take from plaintiff in error, under the forms of law, its inherent and essential right to compensation, and thus deprive it of the "due process of law," of which compensation is an essential condition.

That if the record presents a Federal question, the rulings of the State court on the different questions involved in the review of the judgment, are not conclusive on this Court, but are necessarily before it for review. (See the authorities cited in our Brief, pp. 59–60.)

II.

It is said by counsel that the questions passed upon by the State court were local questions.

This argument ignores the precise ground on which our contention rests—that under the undisputed facts the very

judgment rendered was in itself an appropriation and taking of the property without compensation, and, therefore, a denial of "due process of law." If this contention is sustained it follows that we are entitled, in any view, to have the judgment set aside and a new trial granted.

But what are "the local questions"?

It is said that the State court held that the title of plaintiff in error was limited by the fact that it was a railroad company, with limited powers and that it did not, therefore, have the same power of disposition over its lands as an individual.

This only goes to the point of the extent to which the element of salable value should enter into the *amount* of compensation to be paid. It does not meet the point, that the company nevertheless held the property for all lawful purposes for which it could hold and use any other property owned by it in fee simple. The fact still remains, that even assuming the power of sale to be limited, the entire value of the land to the company for all these purposes, all the value that it had, was destroyed, except the single right reserved to it of crossing the street when opened with its tracks, burdened, however, with the obligation to make new and annual expenditures, on account of the opening of the street, which, as we offered to show, capitalized, would amount to more than the value of the land itself. (Rec., pp. 59, 60.) All right of use, even for any other railroad purpose, was destroyed, and for this it was only given the nominal sum of $1. In other words, the court adjudged by the judgment of condemnation which it entered, that the mere right reserved to plaintiff in error, of crossing with its tracks the street when opened in the same manner and subject to the same limitations as if granted to it by ordinance, and burdened with this new burden of maintaining the crossing,

was equal in value to the property itself, out of which this right was carved, and, therefore, the damage was only nominal.

In fact, the apparent holding of the Supreme Court of Illinois that the plaintiff in error could not sell the property, and, therefore, its salable value should not be considered, was clearly erroneous.

It is familiar law, that a railroad company may sell or lease any of its surplus lands, like an individual, and that this power to sell surplus lands will be implied as an incident to the right of ownership.

Aurora, etc., Society *vs.* Paddock, 80 Ill., 264 at 265.
Morawetz on Corp., Secs. 335, 368, 370.
Beach on Corp., Sec. 357.
Hendee *vs.* Pinkerton, 96 Mass., 386.
White Water Valley Co. *vs.* Vallette, 21 How., 424.

And such was in effect the ruling of the Supreme Court of Illinois itself in the recent case of C. & N. W. Ry. Co. *vs.* Town of Cicero, 157 Ill., 54.

Again, the opinion of the State supreme court on this point proceeds on the mistaken assumption that the deeds to plaintiff in error all describe the property as right of way. From this the inference is drawn that the lands were conveyed only to be used as right of way, and therefore their use could not be changed, as the company could not change the location of its road, etc. Without stopping to consider the different fallacies in this reasoning, which forcibly illustrate the apparent effort of the State court to affirm the judgment of the trial court, it is enough to say that the court was in error as to the facts (see deeds, Rec., pp. 43-52).

In fact, before the decision in these cases, it had been uniformly held by the same court, that a railroad company

holds lands acquired by purchase by an absolute title in fee simple like any other proprietor.

Railroad Co. *vs.* Pence, 68 Ill., 524.

After all, we come back to the original question of the jurisdiction of this Court to review the judgment. If this is established, then, under the uniform decisions of this Court, the Court will review the judgment and rulings of the State court, untrammeled by the decisions of that court on the questions involved, and decide the questions for itself, although they may involve in the particular case, even such local questions as the construction of a State statute, or the proper rule of evidence to be applied, etc.

See Neal *vs.* Delaware, 103 U. S., 370, and Scott *vs.* McNeal, 154 U. S., 34, and cases cited in our Brief, pp. 59–60.

In all such cases, this Court determines for itself whether the Federal right claimed exists, and if it finds that there is such right, will review the judgment of the State court, notwithstanding that court in form recognizes the right and places its decision, denying or destroying the right, on alleged grounds of general or local law.

III.

If our contention is sustained, that the judgment of the State court, taking the property of the plaintiff in error without compensation, denied to it "due process of law," it follows—that this Court in the exercise of its power to review the action of the State court, should set aside the judgment and reverse the case.

And as the judgment is in terms based on the action of the State court, overruling the motion for a new trial, the

Court should remand the case with directions to grant a new trial.

The judicial acts which resulted in the proposed taking of the property without compensation, were the denial of the motion for a new trial, and the rendering of the judgment, and to right the wrong the judgment should be set aside and a new trial granted.

To what extent the Court will review the different rulings of the trial court, which resulted in this erroneous judgment, this Court will determine in the exercise of its reviewing power, as in any other case.

Our contention is, that this Court in the exercise of the jurisdiction, which the denial by the State court of the Federal right gives it, should review all such rulings of the State court, as contributed to the erroneous result—the judgment taking the property of plaintiff in error without compensation.

We call the particular attention of the Court to the ruling admitting the irrelevant and improper evidence of the witnesses for the City, that the value of the use to the City, subject to the right of the railroad company, was "merely nominal," "had no market value," which was in fact the basis of the judgment. (See our Brief, pp. 62–7, 68–72.)

And as to other rulings, see Brief for plaintiff in error, pages 67–86.

It is said by counsel that there was no evidence offered for plaintiff in error, as to the depreciation in value, caused by the opening of the street. In this, counsel is clearly in error (see our Brief, pp. 72–86, and the evidence there collated and referred to). But aside from this, under the express decisions of the supreme court of Illinois, giving construction to the condemnation statute, the actual compensation to which plaintiff in error was entitled, was an affirmative fact to be proved by it as a condition of the

taking of the property, and without the improper evidence admitted for the City over the objection of the plantiff in error, there was no basis in the record for the judgment (see Brief, pp. 62-68).

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